85-2121

NO. 86-

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF ARIZONA,

Petitioner,

-vs-

WILLIAM CARL MAURO,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel, Criminal Division

JOHN VERKAMP
Coconino County Attorney

GEORGIA B ELLEXSON
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)255-4686

Attorneys for PETITIONER

82pp

QUESTION PRESENTED

AFTER MAURO STATED THAT HE WOULD NOT MAKE A STATEMENT WITHOUT A LAWYER PRESENT BUT BEFORE HE WAS CHARGED AND BEFORE HE WAS AFFORDED A LAWYER DID THE STATE VIOLATE HIS FIFTH AND SIXTH AMENDMENT RIGHTS WHEN, IN ANSWER TO A REQUEST FROM HIS WIFE THE POLICE ALLOWED THE TWO TO TALK IN FRONT OF THE POLICE OFFICERS WHO OPENLY RECORDED THE CONVERSATION AND THEN THE STATE IN REBUTTAL AT TRIAL INTRODUCED THESE RECORDED STATEMENTS TO COUNTERACT HIS CLAIM THAT HE WAS INSANE?

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OPINION BELOW

The Arizona Supreme Court's 1986 opinion holding that police conducted "illicit custodial interrogation" in violation of Mauro's Fifth Amendment right to counsel by "allowing [a] conversation to commence" between Mauro and his wife in their presence and preserved by tape recording; and that it was error to allow use of the tape recording in rebuttal to counter Mauro's evidence of his mental condition on that date, is reported at ____Ariz.____, ___ P.2d____ (1986). The opinion is appended here as Exhibit A and the order denying the state's motion for reconsideration is appended as Exhibit B.

STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court which the state asks this Court to review was entered on February 25, 1986. The Arizona Supreme Court denied the state's motion for rehearing on April 15, 1986. This petition is filed within 60 days from that denial, on or before June 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

The pertinent part of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

On the morning of November 23, 1982, seven year old David Mauro began screaming and crying in the bathroom of the family trailer where he had been imprisoned for several days, often locked in a cabinet under the sink. Mauro went to the bathroom stating he intended to quiet the boy. Family members heard him telling the child to shut up. Mauro did not respond to his wife's request through the bathroom door to leave the child alone, but rushed out to retrieve a small black suitcase and returned to the bathroom. Mauro, appearing angry, left the trailer in a hurry with the suitcase. He told his wife to pray.

Mauro carried the suitcase containing David's body to an empty field, burying it under logs. An hour and a half later, he entered a Flagstaff K-Mart store, asking employees to call the police;

telling them he had killed the devil; then stating that he had killed his son. Mauro admitted to arriving officers that he had killed his son. He said he had to do it because the boy was possessed by the devil. He directed officers to the child's location and led police to where the suitcase was buried. Because of the small size of the suitcase, police suspected a bomb-hoax. When the suitcase was carefully opened, David's small hand, which had been folded back against the pressure of the suitcase lid, flopped out as the case was opened. Inside, the body of David Mauro lay in a fetal position. He died of asphyxiation brought about when Mauro forced a rolled up sock and two 2-foot square cloth diapers deep into the child's throat, which, with the child's tongue forced back, completely blocked air passage through the windpipe.

Although the boy suffered from longstanding severe malnutrition and, at age 7 years 8 months, weighed 38 pounds (the average weight of a 4 1/2-year-old child), wounds to his body indicated that he struggled against death, putting up strong resistance against the cloths forced down his throat. It required a minimum of 1 to 2 minutes to force the sock into its final position, and approximately 4 minutes for David Mauro to die. David had numerous bruises and abrasions to his body, some recent. Marks on his ankles were consistent with having been bound.

Following his arrest, Mauro was detained at the Flagstaff Police Department for the collection of physical evidence. He invoked his Miranda[1] rights indicating he did

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1. Miranda v. Arizona, 440 U.S. 934, 99 S.Ct. 1277, 59 L.Ed.2d 429 (1966).

not wish to talk to police without an attorney. Police honored the request. He was placed in an office where a guard was posted for security.

Subsequently, Mrs. Mauro arrived at the police station and after questioning, insisted on speaking to her husband. This was discouraged because of security. At her continued insistence, Detective Manson told her she could speak with Mauro, but that she could not see him alone and that the conversation would be tape recorded. She agreed. Police did not direct Mrs. Mauro to ask any questions or control the content of the conversation. The conversation lasted approximately 5 minutes and was openly tape recorded by Detective Manson sitting about 3 or 4 feet from Mauro and his wife. In this conversation,[2] Mauro, in

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2. The conversation is set out in the opinion of the Arizona Supreme Court, appended at Exhibit A, page A-22-24, infra.

part, told his wife not to answer questions, to get an attorney, that a public attorney was available, and that she was not at fault for failing to stop him. Detective Manson testified the primary reasons for police presence at the conversation concerned safety and security. Mrs. Mauro was allowed to see Mauro because she was upset, without money, and did not know what to do.

At trial, Mauro, who had a history of previous brief stays in mental hospitals, defended on the basis of insanity. However, in the 21-day trial, a picture emerged of Mauro as an intelligent, articulate, sometimes violent individual, who fancied himself an evangelist and used his family as a captive congregation. Anyone posing the least resistance to his views was cast in the role of a "witch" or "devil." As part of its evidence, the defense presented the

testimony of an attorney with the firm representing Mauro, who had observed Mauro after his initial appearance (the same day as the earlier conversation between Mauro and his wife), and who gave his opinion of Mauro's mental state on that date. The defense also introduced an otherwise privileged tape-recorded conversation between Mauro and another attorney, made on the same date, as further evidence of his mental condition. Thereafter, in rebuttal of Mauro's offered evidence of his conduct that day, the state offered the taped conversation between Mauro and his wife as relevant to the jury's consideration of Mauro's mental condition at that time.

Mauro was convicted of first-degree murder and child abuse. The court found that these aggravating circumstances existed: that Mauro had previously been convicted of a felony involving the use

or threat of violence upon another person and that the murder was especially heinous, cruel and depraved. The court found the defendant's mental condition not sufficiently substantial to call for leniency, and imposed the death penalty and a consecutive term of 28 years imprisonment.

The Arizona Supreme Court reversed both convictions on direct appeal. The Arizona Supreme Court held that police conduct in allowing the conversation between defendant and his wife to commence, after defendant had invoked his Miranda rights, amounted to the "functional equivalent" of interrogation under Rhode Island v. Innis, 446 U.S. 291 (1980). The Arizona Supreme Court further held Wainwright v. Greenfield, 474 U.S.____, 106 S.Ct. 634 (1986), precluded the use of Miranda-violative statements (in addition to the accused's

invocation of Miranda rights or resultant silence) to rebut a claim of insanity. Following denial of a timely motion for rehearing, the state petitioned for the instant writ of certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

Review should be granted to clarify and decide important recurring issues of constitutional law. First, to what extent do Sixth Amendment principles define the scope of interrogation under the Fifth Amendment, i.e., whether police conduct in "allowing a conversation to commence" between an accused, who has previously requested counsel, and his wife, at her request and openly tape-recorded by an officer present during the conversation, constitutes the "functional equivalent of interrogation" under Rhode Island v. Innis, 446 U.S.

291, and whether such conduct violates the Fifth Amendment under the reasoning of Maine v. Moulton, 474 U.S.____, 106 S.Ct. 477 (1985), (prohibiting "knowing exploitation" of an opportunity to interrogate in the absence of Sixth Amendment right to counsel).

Second, this Court should decide whether the Arizona Supreme Court improperly expanded Wainwright v. Greenfield, 106 S.Ct. 634, (precluding use of an accused's invocation of Miranda rights or resultant silence as evidence of sanity) by holding that an accused's statements, unrelated to the invocation of Fifth Amendment rights and used directly to rebut specific evidence presented by the defense on the sanity issue, must be excluded. A discussion of each issue follows.

The Arizona Supreme Court has expanded the definition of interrogation under the

Fifth Amendment beyond that ever applied by this Court. Moreover, the Arizona Court's reliance on Sixth Amendment principles in this case is improper as it fails to take into account the recognized distinction between Fifth and Sixth Amendment rights.

In Rhode Island v. Innis, 446 U.S. 291, this Court considered the meaning of the term "interrogation" under Miranda v. Arizona, 440 U.S. 934. Miranda itself was concerned that the "interrogation environment," created by the interplay of interrogation and custody, would "subjugate the individual to the will of his examiner." Rhode Island v. Innis, 446 U.S. at 299, citing Miranda v. Arizona, 440 U.S. at 457-58. As this Court noted in Innis, under Miranda, "interrogation must reflect a measure of compulsion above and beyond that inherent in custody itself." Id., 446 U.S. at 300.

It is with this pronouncement that, at footnote 4, the Court in Innis rejected the notion that the definition of interrogation under Miranda was informed by the Court's decision in Sixth Amendment right to counsel cases:

> The definitions of "interrogation" under the Fifth and Sixth Amendments, if indeed the term "interrogation" is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.

Id. (citation omitted).

The Sixth Amendment right to counsel comes into play only with the commencement of adversary proceedings against an individual. Massiah v. United States, 377 U.S. 201, (1964). The right to legal representation has attached at this point whether or not "interrogation" occurs. See Michigan v. Jackson, 475 U.S.____, 106 S.Ct. 1404, 1409,fn.5, (1986), citing United States

v. Wade, 388 U.S. 218, (1967). Thus, this Court has determined that the Fifth Amendment "interrogation" standard and the Sixth Amendment "deliberate eliciting" or "knowing exploitation" standard, having not been devised to treat the same concerns, are not interchangeable.[3]

Most recently, in Michigan v. Jackson, 106 S.Ct. 1404, where the Edwards[4] rule was applied to Sixth Amendment waiver questions, this Court differentiated between otherwise similar

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3. As noted by the dissent in Solem v. Stumes, 465 U.S. 638, fn.7, (1984) the Court, in recognizing the distinct policies underlying the Fifth and Sixth Amendment has often rejected reliance on Sixth Amendment precedent in Fifth Amendment contexts and vice versa.

4. Edwards v. Arizona, 451 U.S. 477, (1981) (Once suspect has invoked right to counsel, he is not subject to further interrogation by authorities until counsel has been made available, unless accused initiates further communication, exchanges, or conversations with police).

methods of investigation, depending on whether Fifth or Sixth Amendment rights were implicated. The attachment of the Sixth Amendment to a criminal defendant carries "at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation". Michigan v. Jackson, 106 S.Ct. at 1409. That the converse is true, however, remains undecided.

> Indeed, after a formal accusation has been made -- and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment -- the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cellmate, see United States v. Henry, 447 US 264, 65 L Ed 2d 115, 100 S Ct 2183 (1980), or the electronic surveillance of conversations with third parties, see Maine v. Moulton, supra; Massiah v. United States, 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199 (1964), may violate the

> defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment.

Id., 106 S.Ct. at 1409 (footnote omitted). The Arizona Supreme Court's cross-application of Sixth Amendment right to counsel cases in the context of a Fifth Amendment interrogation question is simply an unwarranted extension of the Fifth Amendment without authority.

Further, with or without application of Sixth Amendment standards, the facts of this case do not support the conclusion that impermissible "interrogation" occurred. Following his arrest, Mauro was advised of the Miranda warnings and invoked those rights. Police honored that invocation and did not question him. He was detained at the Flagstaff Police Department for the collection of physical evidence. As no secured rooms were available, he was ushered to Captain

Latham's office where a guard was posted for security purposes. Mauro was considered dangerous.

After Mrs. Mauro arrived at the police station for questioning, she insisted on speaking to her husband. This was discouraged because of security. At her continued insistence, Detective Manson informed her that she could speak to him, but that she could not see him alone and that any statement between the two of them would be tape-recorded. Mrs. Mauro agreed to see her husband under these conditions. The conversation between Mauro and his wife lasted approximately 5 minutes and was tape-recorded by Detective Manson with a tape recorder that he held in open view about 3 or 4 feet from them.

The Arizona Supreme Court concluded that this police conduct was the "functional equivalent of interrogation"

because they "allow[ed] a conversation to commence" between Mauro and his wife, knowing that it was possible that the defendant might make an incriminating statement and if he did, the tape recording would preserve the statement. Such awareness on the part of police is not equivalent to a motive by police to circumvent Fifth Amendment rights. See United States ex rel. Church v. DeRobertis, 771 F.2d 1015, 1019 (7th Cir. 1985).

Moreover, under the Arizona Supreme Court's expansive definition, anything that results in incriminating statements would be interrogation. Other courts have rejected this "but-for" causation test. Id., 771 F.2d at 1019; United States v. Franklin, 704 F.2d at 1190 (10th Cir.), cert. denied, 464 U.S. 845 (1983). Indeed, the Court in Innis expressly rejected such an

interpretation. That an accused feels "subtle compulsion" does not mean he is subjected to interrogation. It must also be shown that the response was the product of actions on the part of police that they should have known was reasonably likely to elicit an incriminating response. The Arizona Supreme Court's opinion blatantly disregards this requirement. "Allowing the conversation to commence," as found in the instant case, is little different from the situation in footnote 10 of Rhode Island v. Innis, 446 U.S. at 304, illustrating the difference between subtle compulsion and impermissible interrogation.

> By way of example, if the police had done no more than to drive past the site of the concealed weapon while taking the most direct route to the police station, and if the respondent, upon noticing for the first time the proximity of the school for handicapped children, had blurted

> out that he would show the officers where the gun was located, it could not seriously be argued that this "subtle compulsion" would have constituted "interrogation" within the meaning of the Miranda opinion.

Id. In the same sense, Mauro's wife's unsolicited request to speak to her husband was just such subtle compulsion. Both parties understood their conversation was neither private nor privileged. Mrs. Mauro's presence was the catalyst that provoked the statements, not the officer's conduct. Her request, by happenstance, gave officers an opportunity that they otherwise would not have had. The Arizona Supreme Court has effectively eliminated the rule that neither Fifth nor Sixth Amendment rights are violated when "by luck or happenstance" the state is privy to incriminating statements made by the accused. See Maine v. Moulton, 106 S.Ct. at 486-87.

Having erroneously found that Mauro's statements to his wife constituted interrogation and that they were taken in violation of the Fifth Amendment, the Arizona Supreme Court then compounded that error by expanding the holding in Wainwright v. Greenfield, 106 S.Ct. 634 (1986), to preclude the use of so-called Miranda-violative statements. Greenfield does not support the conclusion that evidence of the conversation was improperly admitted to rebut a claim of insanity. Greenfield held that it violates the due process clause to use post-arrest, post-Miranda warnings silence (meaning "muteness" and the statement of a desire to remain silent) as evidence of sanity.

> Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt.

Wainwright v. Greenfield, 106 S.Ct. at 640, fn.11. Thus, this Court determined

that the prosecutor's comments in closing argument that the defendant's sanity was shown by evidence of the defendant's exercise of his right to remain silent and request for an attorney, violated the implied promise in Miranda that invocation of his rights would not be used against him.

By contrast, Mauro clearly did not invoke his rights in his conversation with his wife. In fact, it was a conversation in which Mauro gave rational, clear advice to his wife. He advised her to not answer questions, to get an attorney, that there was a public attorney available, and he made incriminating statements that she was not at fault for failing to stop him. Mauro's conversation with his wife does not run afoul of the "implied promise" that his silence would not be used against him which is the touchstone of

this Court's opinion. Similar advice has been held not to constitute an exercise of the right to remain silent. United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) (Defendant's advice to his brother and third party not to say anything does not imply defendant himself had chosen to exercise his right to remain silent, but that he was merely admonishing others not to speak, and thus, did not constitute comment on defendant's exercise of right to remain silent). The state did not use Mauro's muteness or even the statement of a desire to remain silent. There is no Fifth Amendment content in the conversation itself, and no proscription against its use on the basis of Greenfield.

Moreover, to rule the statement inadmissible under the circumstances of this case is especially egregious. Mauro presented a defense of insanity. To

prove it he offered testimony of an attorney of the firm representing him that when the lawyer observed Mauro at the jail on the afternoon after his initial appearance, (on the same day as the earlier conversation between Mauro and his wife) Mauro's behavior was "unusual"; he was huddled in the corner, staring, drooling, and not saying anything. The attorney described Mauro as "sort of in a catatonic trancelike state." In his opinion, Mauro was "crazy," "unquestionably" a "very disturbed individual." The defense also introduced a tape recording of a meeting between Mauro and another attorney made on the same date. Notably, it was the defense that first sought to establish Mauro's mental condition through his acts and statements on the day of his initial appearance. Thus, the statements made by Mauro to his wife on that date were

highly relevant to the jury's consideration.

Even assuming a Miranda violation occured, the ruling of the Arizona Supreme Court suppressing the evidence is inconsistent with the reasoning expressed in cases such as Harris v. New York, 401 U.S. 222 (1971), and Oregon v. Hass, 420 U.S. 714 (1975). The shield provided by Miranda is not to be perverted into a license to testify inconsistently or perjuriously, "free from the risk of confrontation with prior inconsistent utterances." Oregon v. Hass, 420 U.S. at 722. The same perversion occurs here where the Arizona court permits the accused to hide from the jury "unfavorable" statements regarding the issue of sanity, after having affirmatively presented only selected, isolated impressions of his demeanor

favorable to his defense. Miranda would not tolerate that and Greenfield does not require it.

This Court should reverse the holding of the Arizona Supreme Court that Wainwright v. Greenfield prohibits admission of the conversation between Mauro and his wife, even if it was Miranda-violative, as it was introduced in rebuttal as impeachment of Mauro's specifically offered evidence of otherwise privileged conversations between himself and his attorneys, pertaining to his mental condition at the time of his arrest.

CONCLUSION

The Fifth Amendment protections of Miranda apply in situations where official compulsion, coupled with custody, are likely to overbear the accused's will and amount to a "compulsion" to testify against oneself. Where police conduct in "allowing a conversation to commence" between the accused and his wife bears no indicia of such a practice, it does not constitute the impermissible functional equivalent of interrogation under Rhode Island v. Innis. Further, where the Sixth Amendment right to counsel has not attached and its concerns are not present, the reasoning in Sixth Amendment cases is not applicable to questions of interrogation under the Fifth Amendment. Finally, the due process considerations in Wainwright v. Greenfield that led this Court to preclude comment on an accused's

invocation of the Miranda rights or resultant silence as evidence of sanity, has been inappropriately expanded by the Arizona Supreme Court to exclude admission of highly relevant statements of an accused, unrelated to invocation of Fifth Amendment rights, to rebut specific defense evidence on the issue of sanity.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

JOHN VERKAMP
Coconino County Attorney

Georgia B. Ellexson

GEORGIA B. ELLEXSON
Assistant Attorney General

Attorneys for PETITIONER

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GEORGIA BUTCHER ELLEXSON, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That she served three copies of the Petition for Writ of Certioarari upon Kathleen Kelly Walsh, 401 N. San Francisco, P. O. Drawer X, Flagstaff, Arizona 86002, Attorney for William Carl Mauro, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, she herewith certifies that service of three copies of this petition has been made upon the United St s of America by depositing the same in the United States Mail, with first class postage prepaid,

addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

GEORGIA BUTCHER ELLEXSON
Assistant Attorney General
Department of Law
1275 West Washington
Phoenix, Arizona 85007
Telephone: (602) 255-4686

SUBSCRIBED AND SWORN to before me this 13th day of June, 1986.

SUSAN C. LEWIS
NOTARY PUBLIC

My Commission Expires:

October 17, 1988

CR63-060/9380D/scl

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF ARIZONA
EN BANC

STATE OF ARIZONA	)	
	)	
Appellee,	)	Supreme Court
	)	No. 6329
v.	)	
	)	
WILLIAM CARL MAURO,	)	Coconino County
	)	Superior Court
Appellant,	)	No. 10056
	)	

APPEAL FROM THE SUPERIOR COURT
OF COCONINO COUNTY

THE HONORABLE RICHARD K. MANGUM, JUDGE

REVERSED AND REMANDED

Robert K. Corbin
The Attorney General
By William J. Schafer III
and Diane Hienton
Assistant Attorneys General Phoenix
Attorneys for Appellee

Ratner & Walsh
By Kathleen Walsh Flagstaff
Attorneys for Appellant

HAYS, Justice

Appellant, William Carl Mauro, was convicted of one count of first degree

murder, A.R.S. § 13-1105, and one count of child abuse, A.R.S. § 13-3623. He was sentenced to death for the murder conviction and to a term of 28 years for the child abuse conviction. The sentences were to run consecutively. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and -4035.

The facts from the record follow. On November 23, 1982, Mauro and his family were eating breakfast when appellant's seven-year-old son David began crying and screaming. David was in the bathroom where he had been imprisoned for several days by his father. Mauro told his wife that he would make the boy be quiet. Mauro went into the bathroom and forced a rolled child's sock and two cloths down the boys throat, thus suffocating the child. Mauro then went to a bedroom and returned with a suitcase in which he placed the child's body. As he left the

family trailer with the suitcase, he told his wife to "pray."

After leaving the trailer, Mauro was observed carrying the suitcase through the residential neighborhood surrounding his home. Despite it being a very cold morning, appellant was wearing neither a coat nor shoes. When he reached an empty field, Mauro buried the suitcase under logs in a woodpile.

About one and one-half hours after he was seen near the field, Mauro appeared at a K-Mart store. There he asked employees to call the police. Flagstaff police received a call from an employee who said a man had entered the store claiming to have killed something. The employee described the man as being very exited and delirious. Several witnesses heard Mauro claim to have killed the devil and to have put him in a suitcase, but that he was still moving. Later,

Mauro told these same witnesses that he had killed the devil, his son. Once again the K-Mart employee called the police to add this admission. He stated that Mauro was "out of it" and "really afraid."

When the police arrived, Mauro continued to claim that he had killed his son who was possessed by the devil. He insisted on showing police where the suitcase was concealed. Mauro told the officers that he'd take the "rap," and that "I know I'll get executed or go to the penitentiary, but I had to do it." He helped officers locate the suitcase and was then taken to the police station. Because of Mauro's behavior and the small size of the suitcase, offices were unwilling to open the suitcase until a bomb expert could examine it. When the bomb expert discovered the body, Mauro was taken back to the scene and formally arrested.

An autopsy of David's body revealed that he had died of asphyxiation. Although he was seven years old, David weighed only 38 pounds and was 46.2 inches tall. He had numerous bruises and abrasions over his body, some of which were recent. Additionally, marks on his ankles were consistent with having been bound, and he showed signs of malnutrition. Finally, the wounds on David's body indicated a struggle shortly before death, including strong resistance to the sock being placed in his mouth.

Mauro's sole defense at trial was insanity. As a result of this court's decision in State v. Coconino County Superior Court, Division II (Mauro), 139 Ariz. 422, 678 P.2d 1386 (1984), the State retained the burden of proof on this issue. Testimony at trial revealed that Mauro had a history of mental problems, going back at least as far as

1970. He had been hospitalized at least ten (10) times during those years, including once in Flagstaff in February 1982, nine months before the killing. His mother also had a history of mental problems. Specifically, she had been diagnosed as a manic depressive (now known as bipolar affective disorder).

At the request of his court-appointed attorney, Mauro was seen by his Flagstaff psychiatrist, Dr. Dean Gerstenberger, on the day of the killing. Later, Dr. Gerstenberger was appointed by the court to evaluate appellant's competency to stand trial and his legal sanity at the time of the killing. At trial, the doctor testified that Mauro had slipped into a psychotic state some days prior to the killing and had remained there for some weeks after the episode. Dr. Gerstenberger further testified that appellant was legally insane under the

M'Naghten rule when he killed David. He based this determination primarily on testimony regarding Mauro's behavior prior to the murders. Specifically, testimony revealed that Mauro spoke of space creatures outside the trailer which planned to take his family's souls; that he paced the floor all night, "pleading the blood"; that his wife's sister had come in spirit to take over his wife's soul; and that he had repeatedly rolled around on the floor. In light of this evidence, Dr. Gerstenberger diagnosed appellant as suffering from a bipolar affective disorder.

Dr. Michael Cleary, a Phoenix psychiatrist nominated by the State, was also appointed by the court to evaluate appellant. He testified that Mauro had a compulsive personality disorder with paranoid features and was not insane under the M'Naghten test. On

cross-examination, the doctor stated that he had some doubt about appellant's sanity at the time of the killing, but he acknowledged that appellant was in a disturbed state of mind and was probably hallucinating during the two or three days prior to the killing. However, the doctor stated that the evidence of concealment of the body shows that Mauro knew right from wrong.

I. SEVERANCE

Prior to trial, appellant moved to sever the premeditated murder count in the indictment from the child-abuse count. A decision to grant denial of a motion to sever is within the sound discretion of the trial court and will be reversed only if that discretion is abused. State v. Cruz, 137 Ariz. 541, 544; 672 P.2d 470, 473 (1983). In deciding whether to grant the severance, the trial court weighs the possible

prejudice to the defendant against the interests of judicial economy. Id.

First, appellant raises as error the court's refusal to sever the two counts in order to permit a fair determination of guilt under Rule 13.4(a), Rules of Criminal Procedure, 17 A.R.S. Appellant argues that joinder of the counts allowed the state to overcome the marital privilege statute which gives one spouse the right to keep the other spouse off the stand as a witness. A.R.S. § 13-4062(1). Specifically, appellant contends that the child-abuse count permitted spousal testimony to be introduced into evidence because the marital privilege is unavailable in a criminal proceeding "in which child neglect, dependency, abuse or abandonment is in issue." A.R.S. § 13-3620(d). The trial court denied appellant's motion to sever, stating that the killing of a

child from the marriage is so hostile and antagonistic to the purposes of the marriage that the privilege should not apply. We agree with the trial court that even in the absence of the child-abuse count, the privilege would not apply.

The matrimonial privilege is unavailable when a spouse kills a child of the marriage. State v. Ulin, 113 Ariz. 141, 145, 548 P.2d 19, 23 (1976); State v. Figueroa, 122 Ariz. 190, 192, 593 P.2d 940, 942 (App. 1979). Evidence was presented at trial revealing that both spouses engaged in acts of child abuse; however, only one parent committed the homicide. It is therefore unnecessary for us to address the argument as to whether the same result would occur when both parents are codefendants to the homicide. The trial court did not abuse its discretion.

Second, appellant claims that the child-abuse count was actually a lesser-included offense of the murder charge and, therefore, should not have been included in the indictment. The issue of lesser-included offense was not advanced at the trial level and therefore defendant has waived the issue. State v. Thomas, 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981).

Finally, appellant claims that he was entitled to severance as a matter of right under Rule 13.4(b), Rules of Criminal Procedure, 17 A.R.S. This argument is entirely without merit. Entitlement to severance by right is only available to offenses joined under Rule 13.3(a)(1). See Rule 13.4(b). The two counts were joined under the "same conduct" provision of Rule 13.3(a)(2) and not the "same or similar character" provision of Rule 13.3(a)(1). The

indictment was amended to allege that both the homicide and the child abuse involved the use of a dangerous instrument: "one white child's sock with two stripes and one white cloth measuring approximately 24 inches by 24 inches." (This cloth was referred to at trial as a diaper). The prosecution chose to charge appellant with only the actions of abuse that ultimately led to the death of David. Thus, since both charges were based on the "same conduct," the severance request was properly denied.

II. VOIR DIRE

Appellant contends that there was an insufficient voir dire concerning the insanity defense and various religious issues in the case. Prior to the voir dire, both the prosecution and defense submitted extensive lists of voir dire questions to the trial judge. The court refused to ask any of the questions

submitted by the defense on religion. From almost fifty questions submitted by both the prosecution and defense on insanity, the judge asked only one. He added another of his own to the list.

The scope of voir dire is left to the sound discretion of the trial court. State v. Tims, 143 Ariz. 196, 198, 693 P.2d 333, 335 (1985). Absent a clear abuse of discretion, limitation of voir dire will not be adjudged error on appeal. Id. Rule 18.5(d) provides that the trial court "shall conduct the voir dire examination, putting to the jurors all appropriate questions requested by counsel." See State v. Chaney, 141 Ariz. 295, 303-04, 686 P.2d 1265, 1273-74 (1984).

In State v. Chaney, supra, we upheld a voir dire on an insanity issue which also consisted of only two questions. 141 Ariz. at 303, 686 P.2d at 1273. The

first question in Chaney differed from that in this case. In Chaney, the court asked:

> Are any of you acquainted with anyone who has been treated for having a mental disorder, a neurological disorder, or a brain disorder?

Id. Both the defense and the prosecution submitted questions that paralleled this inquiry but they were not asked. We find the questions to be direct and relevant. However, because we dispose of the case on other grounds, we need not decide if it was an abuse of discretion for the trial court to refuse to ask them.

Although we need not decide if the court's voir dire on insanity was sufficient to avoid error, we believe that, in the future, trial court's should broaden the scope of their inquiry to extend beyond the minimum due process demands of "putting to jurors all

appropriate questions requested by counsel." See State v. Chaney, 141 Ariz. at 303-04, 686 P.2d 1273-74 (quoting Rule 18.5(d)).

Appellant also urges that the court's refusal to ask any of the proposed questions concerning religious issues amounted to prejudicial error. This court has recently held that the religious faith, affiliation and beliefs of a prospective juror are a proper subject of inquiry on voir dire in certain cases. State v. Via, 146 Ariz. 108, 117-18, 704 P.2d 238, 247-48 (1985); see 47 Am. Jur. 2d Jury § 283. Specifically, in analyzing a case, we must consider whether there is a nexus between the prejudice feared and an issue in the case. State v. Skaggs, 120 Ariz. 467, 586 P.2d 1282 (1978).

The record in this case reveals the court's concern about questioning jurors

on religion as it related to the case. Further, the court apparently found defense counsel unable to articulate exactly what prejudice was feared:

> The court:
>
> . . . .
>
> It's so vague. The case involves religious beliefs which you may or may not espouse. What sacrament, using water instead of wine? They would have no idea what you are talking about. Would the fact that this case concerns certain religious beliefs affect your ability to serve as a fair and impartial juror in this matter? If I were on that panel and you asked me that question, I wouldn't have the foggiest idea what I was being asked or how I could fairly respond.
>
> . . . .
>
> You might think about it some more and try to give me a question I can use, but these are improper and I won't ask them. I think they are unfair and improper.

Appellant alleges he was prejudiced by the court's refusal to ask the questions on religion. However, the court did not refuse to voir dire the jury on religion;

it refused only to ask those questions which amounted to argument. In State v. McMurtrey, 136 Ariz. 93, 98-99, 664 P.2d 637, 642-43, cert. denied, 464 U.S. 858, 104 S.Ct. 180 (1983), this court held that it is not an abuse of discretion to refuse to ask questions that are argumentative.

Further, questions as to the religious beliefs and associations of veniremen are improper unless they are directed at specific prejudice. See State v. Via, 146 Ariz. at 118, 704 P.2d at 248. In the instant case, appellant's questions apparently were pointed at generalized fears concerning witchcraft and satanism. For example, defense counsel stated:

> If the testimony comes out that my client was practicing witchcraft and satanism and we have a prospective juror on there that has feelings against that and goes into the jury room and convicts

> because of his view concerning those types of practices, I think we have a problem.

In reviewing the proposed questions, the trial court concluded that counsel had not sufficiently drafted the questions so that a juror could understand them. Rather, the court found them both vague and unfair. We agree and therefore find it was not an abuse of discretion to reject them.

III. FIFTH AMENDMENT CLAIMS

Appellant asserts that the admission of a tape-recorded conversation between himself and his wife violated his state and federal rights not to incriminate himself. U.S. Const. amend. V, XIV; Ariz. Const. art. 2, § 10. We agree and reverse on this issue.

After the discovery of the body, appellant was driven by police officers back to the field by the K-Mart. Detective Allen formally arrested

appellant and advised him of his Miranda rights. Allen then asked appellant if he understood those rights and appellant replied that he did. When appellant was transported to the police station, he was once again advised of his Miranda rights at 10:45 a.m. At that time, appellant told the officers that he did not wish to make any statements without the presence of an attorney. That conversation was recorded but not admitted into evidence at the trial.

While appellant was being held in the captain's office, Mrs. Mauro was being questioned in another room. During that questioning, Mrs. Mauro told Detective Manson that her husband had a history of mental illness. Further, she related accounts of various acts of discipline that might constitute child abuse. Mrs. Mauro detailed appellant's behavior prior to and after the homicide,

including claims that he saw spacemen. At the end of the questioning, she requested that she be able to talk with her husband.

At around 11:00 a.m. Detective Manson approached Detective Allen and discussed Mrs. Mauro's request to speak to her husband. Manson told him that he didn't think it was a very good idea to allow the two to meet. Allen disagreed with Manson and allowed the visit. He directed Manson to be present when the conversation took place and to tape-record it. Allen testified that he wanted Manson present for security and because at that time he "still was in the dark somewhat." He "didn't know if the two of them were involved together in the crime." Therefore, he feared they might concoct stories or get their stories together.

Both detectives testified at pretrial hearings that they were aware that appellant might make incriminating statements. The defense asked Detective Allen:

> Q. . . . certainly when you sent an officer in there to listen to that conversation, you knew that it was possible that he might make incriminating statements?
>
> A. That's correct.
>
> Q. And obviously, you wanted to record that conversation so as to have a record of those incriminating statements?
>
> A. That's correct.

Later, Detective Manson was asked substantially the same questions:

> Q. Frank, certainly you were aware that during the conversation either Linda or my client may have given an incriminating statement?
>
> A. Yes.
>
> Q. And obviously one of the purposes of your tape recording the interview was to take down any such statements?

A. Yes, sir.

Although the detective sat three or four feet from appellant with the tape record in plain view, appellant was never told the conversation would be taped. The taped conversation was brief:

. . .

MRS. MAURO: Please -- please, I don't know what to do. We should have put David in the hospital. Please -- I don't know what we're going to do. We should have went for help -- we should have went for help.

APPELLANT: You tried as best you could to stop it.

MRS. MAURO: I --

APPELLANT: Shut up.

MRS. MAURO: -- taken him to a mental hospital or something. What'll we do?

APPELLANT: Shut up.

DET. MANSON: Do you know a reverend or a priest

or someone you can talk to -- take care of David?

MRS. MAURO: No.

APPELLANT: Don't answer questions until you get rights of attorney before you find out whats going on. You tried to stop me as best you can. What are you going to do, kill me? You tried the best you can to stop me.

MRS. MAURO: I don't -- we don't -- I don't have money.

APPELLANT: There's a public attorney.

MRS. MAURO: I don't know.

APPELLANT: There's a public attorney. Why don't you just be quiet.

MRS. MAURO: I don't have any money to bury him. I don't have any money. All I got is enough money for the rent for the children and that's it.

DET. MANSON: Did you want to talk to your husband any more?

MRS. MAURO: No, I can't talk to him.

APPELLANT: Then don't talk to me -- get out.

MRS. MAURO: I don't know what to do. O.K.

The trial court found that: 1) the conversation was voluntary; 2) the police did not initiate the conversation; and 3) the tape was highly probative of appellant's sanity or insanity at the time of the crime. Both psychiatrists used this tape in appellant's evaluation.

The right to counsel under the fifth amendment is a protection of the privilege against self-incrimination. United States v. Gouveia, ____U.S.____, ____, 104 S.Ct. 2292, 2298 n.5 (1984). If a person subjected to custodial interrogation invokes his Miranda rights, the interrogation must cease. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85 (1981); State v. Finehout,

136 Ariz. 226, 229, 665 P.2d 570, 573 (1983).

The state contends that the tape-recorded conversation does not constitute a violation of appellant's rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). The cases the State relies upon involve conversations between defendants and their spouses. We disagree that the present case is controlled by these cases. In the Narten cases, State v. Narten, 99 Ariz. 116, 407 P.2d 81 (1965), cert. denied, 384 U.S. 1008, 86 S.Ct. 1985 (1966), and Narten v. Eyman, 460 F.2d 184 (9th Cir. 1969), a husband and wife conversation took place in a sheriff's office. An officer was placed nearby to guard the defendant. There was no evidence of any intent to surreptitiously eavesdrop; in fact, the officer was at such a distance that he

heard only parts of the conversation. Although this conversation took place after the sixth amendment right to counsel attached, the officer who accidently overheard the conversation was able to testify. There was no indication that this officer or the state used this conversation as a device to accumulate incriminating evidence.

In State v. Summerlin, 138 Ariz. 426, 675 P.2d 686 (1984), a defendant requested that he be able to speak to his wife. The police told him that an officer would have to be present. The record shows no attempt to surreptitiously eavesdrop. Once again, the guarding officer who overheard part of the conversation was able to testify. Summerlin only addresses the issue of anti-marital fact privilege and not the right of counsel.

Unlike the Narten cases and Summerlin, this is not a case where an officer accidentally overhears a conversation. Rather, here we have illicit custodial interrogation. At the time of the tape recording at issue, appellant was under arrest and being detained at a police station. There is no doubt that this constituted a custodial setting. However, besides being in a custodial setting, the conversation must constitute "interrogation."

Interrogation includes a "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1690 (1980). "The focus in ascertaining whether particular police conduct amounts to interrogation, then, is not on the form of the words used, but the intent of the police officers and the perceptions

of the suspect." State v. Finehout, 136 Ariz. at 230, 665 P.2d at 574. An incriminating response is any response -- whether inculpatory or exculpatory -- that the prosecution may seek to introduce at trial. Rhode Island v. Innis, 446 U.S. at 301 n.5, 100 S.Ct. at 1690 n.5.

The intent of the detectives is clear from their own testimony. They both knew that if the conversation took place, incriminating statements were likely to be made. With that in mind, they decided to take in a tape recorder, sit near appellant and his wife and allow the conversation to commence.

Since the intent of the detectives is so clear, we need not address appellant's perceptions. Whether the police knew that appellant was unusually disoriented or upset might have been an important factor in this case had the State's

intent not been so unambiguous. See id., 446 U.S. at 302-03, 100 S.Ct. at 1690 (suspect's peculiar susceptibility to the police appeal and whether the police knew that appellant was unusually disoriented or upset are factors to be examined in determining the perceptions of a suspect). We find, therefore, that in allowing the conversation to commence, the police did indirectly what they could not do directly--interrogate appellant.

Because this problem may arise again, we find it necessary to explain the right of a suspect who has invoked his right to silence. In doing so, we believe that language in a recent United States Supreme Court opinion on the right to counsel under the sixth amendment is equally applicable here:

> [The right to counsel] is not violated whenever--by luck or happenstance--the State obtains incriminating statements from the accused after the right to counsel

> has attached. [Citation omitted.] However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity.

Maine v. Moulton, ____U.S.____, 106 S.Ct. 477, 487 (1985) (emphasis added).

Although appellant's sixth amendment right to counsel had not attached at the time of the conversation, clearly the state could no longer interrogate appellant directly. Equally, the police may not circumvent appellant's right to silence by "exploiting" an opportunity and do indirectly what they could not do directly. Since the police in this instance controlled not only whether the conversation took place, but also the placement of the officer in the room, we cannot condone the use of this tape at trial.

The tape may not be admissible at trial; however, the doctors can use this tape in their Rule 11 evaluations. In State v. Mitchell, 106 Ariz. 492, 497, 478 P.2d 517, 522 (1970), we allowed an officer to give an opinion as to a defendant's sanity even though that opinion was based partly on a conversation with the defendant which had been suppressed by the trial court. Further, Rule 703, Arizona Rules of Evidence, A.R.S. 17A, specifically provides that facts or data usually relied upon by experts informing an opinion need not be admissible in evidence.

As for presenting this evidence to the jury to formulate the basis of an opinion as to appellant's sanity, we believe the practice set forth by the United States Supreme Court is instructive. In Wainwright v. Greenfield, ____U.S.____,

106 S.Ct. 634 (1986), the Court held that it is violative of the due process clause to use a defendant's post-arrest, post-Miranda warnings silence as evidence of sanity. The court interpreted silence to mean "not only muteness" but also "the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." Id. at 640 n.13. In other words, the state cannot use the words a defendant uses to request an attorney as evidence of sanity. However, the state may, through carefully framed questions that avoid any mention of the defendant's exercise of his constitutional rights to remain silent and to consult with counsel, present evidence that after his arrest, defendant's behavior appeared rational. Likewise, we believe that the state can present evidence that appellant was able to talk rationally after his

arrest; however, they cannot make specific reference to this conversation.[1]

IV. EVIDENTIARY ISSUES

Appellant has raised the admission of various items of evidence and testimony as constituting fundamental errors. Since we have decided to reverse this case on other grounds, we will discuss only those evidentiary issues which are likely to re-occur on retrial.

A. Inflammatory Photographs

Appellant argues that the trial court committed reversible error by admitting

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1. Parts of the tape-recorded conversation probably violated appellant's due process rights under the fourteenth amendment. See Wainwright v. Greenfield, ____U.S. at ____, 106 S.Ct. at 639-40 (it is fundamentally unfair for the State to promise in the Miranda warnings that silence will not be used as a penalty, and then to unfairly "trick" him by using as evidence the words of his response at trial). However, since we are disposing of the entire conversation we do not have to do a piecemeal analysis of it.

several inflammatory photographs of the victim. He claims that the prejudicial effect of these photographs outweighed their probative value. After holding an evidentiary hearing on the issue, the trial court excluded most of the photographs. However, the court did allow some of the photographs into evidence. These included pictures of the child's body in the suitcase, pictures of the body showing bruises and other marks of abuse, and autopsy pictures of the child with rags in his mouth. There was also a photograph of the child's internal organs showing the placement of the sock in the victim's throat, and the presence of wounds on the victim's lips.

Inflammatory photographs may be admitted if they are relevant and if their probative value outweighs the danger of unfair prejudice. State v. Bracy, 145 Ariz. 520, 533, 703 P.2d 464,

477 (1985), cert. denied, ____U.S.____, ____S.Ct.____ (Jan. 27, 1986). The decision to admit these photographs will not be disturbed on appeal absent a clear abuse of discretion. Id.

A trial court's decision to admit photographs is based on the purpose behind the offer. Id. Furthermore, even though defense counsel may wish to stipulate to the photographs' contents so as to avoid their use, we cannot compel the state "to try its case in a sterile setting." State v. Chapple, 135 Ariz. 281, 289-90, 660 P.2d 1208, 1216-17 (1983).

In this case, the trial court found that although defense counsel was willing to stipulate to the victim's identity and the method of death, he was not willing to stipulate to premeditation. Premeditation, however, was the basis for the court admitting the photographs. For

example, the trial court found that the picture of the body in the suitcase showed "how much control over his actions the defendant had at the times in question." It showed what could not be adequately described by other means. The same is true for the pictures showing signs of child abuse. Additionally, the pictures showing wounds on the victim's lips and the placement of the rages in his throat were admitted to show premeditation and to clearly refute any potential suggestion by the defense that Mrs. Mauro killed the child.[2] Although

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2. The photograph of the sock and cloths in the throat was admitted for two purposes: to show premeditation and to refute any suggestion that the wife did the killing. On retrial, unless the defense is clearly raised that Mrs. Mauro committed the homicide and there is evidence that this photograph supports the proposition that no female could have committed the crime, we do not believe the photograph can be admitted to prove Mrs. Mauro did not kill the child. However this photograph may be admissible on retrial solely to prove premeditation.

the photographs were inflammatory in varying degrees, we hold that they were not unfairly prejudicial and, therefore, the trial court did not abuse its discretion in admitting them. See State v. Bracy, supra. These photographs supported the state's theory of the case that the killing was premeditated and the climax of a history of abuse. We find no error in admitting inflammatory photographs when issues such as premeditation are not stipulated. See State v. Bracy, 145 Ariz. at 534, 703 P.2d at 478.

B. Rule 11 Evaluation

Appellant raised as error testimony concerning two statements he made prior to and during his Rule 11 mental evaluation. The trial court appointed Dr. Cleary to evaluate appellant's competency to stand trial and his mental status at the time of the offense.

First, Dr. Cleary testified that appellant refused to see him on his second visit and asked that counsel be present during the evaluation. Further, Dr. Cleary emphasized that this request for counsel was unusual: "it is a big deal. It's the first time it's happened in 1,000 examinations." Earlier, the court had granted appellant's request that counsel be present during the subsequent evaluation. Second, Dr. Cleary testified that at the beginning of the interview, appellant stated that he "felt like a sitting duck." Appellant argues that the first statement was an impermissible comment on his right to counsel and the second was a violation of Rule 11.7(b), Arizona Rules of Criminal Procedure, 17 A.R.S.

The psychiatric evaluation is a "critical stage" of a proceeding and appellant has a right to counsel in

formulating his approach to the examination. Estelle v. Smith, 451 U.S. 454, 470, 101 S.Ct. 1866, 1877 (1981). However, it appears there is no constitutional right to have an attorney present during a court-ordered psychiatric examination itself. See id. at n.14.

In this case, however, the trial court permitted appellant to have counsel participate in the Rule 11 evaluation. Since we have reversed this case on other grounds, we do not need to reach the ultimate issue of whether the doctor's comment on appellant's request for counsel constituted fundamental error. However, on remand we direct the trial court to restrict the use of this evidence in accordance with the due process analysis of Wainwright v. Greenfield, supra. Since the trial court allowed appellant's counsel to be

present, and the right to have counsel present at the evaluation is an unsettled question, it seems fundamentally unfair to later use that request as evidence of sanity. However, the jury should be allowed to be told that appellant was unwilling to fully cooperate with Dr. Cleary.

The second comment concerning appellant's feeling like a "sitting duck" is challenged as a violation of Rule 11.7(b)(1) regarding privileged statements. This rule states:

> No statement of the defendant obtained under these provisions, or evidence resulting therefrom, concerning the events which form the basis of the charges against him shall be admissible at the trial of guilt or innocence, or at any subsequent proceeding to determine guilt or innocence, without his consent.

The state argues that this was a nontestimonial "verbal act" and therefore not covered by the privilege of Rule 11.7.

Appellant's state of mind at the time of the examination is not a statement "concerning the events which form the basis of the charges." Rather, this statement is probative of appellant's psychological attitude going into the evaluation. We agree, therefore, that its use does not constitute error. However, we believe the use of any statements made by a defendant during such an examination should be strictly avoided. If the exact statement is so important that the prosecution would like to use it during trial, then it is apparently incriminating. Since this rule is to overcome the problem of forced self-incrimination, no statements made during the evaluation should be admitted.

In light of our decision today, it is unnecessary to consider appellant's other issues on appeal. Because appellant's conversation with his wife was improperly

used at trial, we reverse the convictions for first degree murder and child abuse and the sentences imposed are vacated. Accordingly, this matter is remanded to the trial court for proceedings consistent with this opinion.

CONCURRING:

JACK D. H. HAYS, Justice

WILLIAM A. HOLOHAN
Chief Justice

FRANK X. GORDON, JR.
Vice Chief Justice

JAMES DUKE CAMERON
Justice

STANLEY G. FELDMAN
Justice

APPENDIX B

SUPREME COURT

DAVID R. COLE
Clerk

DIANA K. BENTLEY
Chief Deputy Clerk

STATE OF ARIZONA

201 WEST WING STATE CAPITOL
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone (602)255-4536

April 18, 1986

RE: STATE vs. WILLIAM CARL MAURO
Supreme Court No. 6329
Coconino County No. 10056

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 15, 1986, in regard to the above-referenced cause:

"ORDERED: Motion for Reconsideration = DENIED."

Copy of Order Reversing and Remanding enclosed.

DAVID R. COLE, Clerk

TO:
Kathleen Walsh, Esq., Ratner & Walsh
Hon. Robert K. Corbin, Attorney General
Attn: William Schafer III, Esq.
Diane Hienton, Esq.
Georgia B. Ellexson, Esq.

kek

Supreme Court, U.S.
FILED
JUL 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2121

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

STATE OF ARIZONA,

Petitioner,

-vs-

WILLIAM CARL MAURO,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

KATHLEEN KELLY WALSH
Attorney at Law
RATNER & WALSH
P.O. Box 22176
121 East Birch Avenue
Flagstaff, Arizona 86002
(602) 774-5296

Attorney for RESPONDENT

30PP

QUESTION PRESENTED

WAS THE ARIZONA SUPREME COURT CORRECT IN REVERSING THE CONVICTION AND SENTENCE OF WILLIAM CARL MAURO BECAUSE A TAPE RECORDING WAS IMPROPERLY ADMITTED AT TRIAL TO PROVE SANITY, IN VIOLATION OF MAURO'S PREVIOUSLY INVOKED FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION, AS IT WAS ILLICIT CUSTODIAL INTERROGATION FOR POLICE OFFICERS, KNOWING THAT THE CONVERSATION WAS LIKELY TO EVOKE INCRIMINATING STATEMENTS, TO ARRANGE FOR MAURO AND HIS WIFE TO CONVERSE, AND TO DELIBERATELY LISTEN TO AND TAPE THAT CONVERSATION?

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OPINION BELOW

The Arizona Supreme Court's ruling is reported at _____ Ariz. _____, 716 P.2d 393 (1986). The opinion is appended in the Petition for Writ of Certiorari, as Exhibit A, and shall not be further appended in Respondent's Brief in Opposition.

STATEMENT OF JURISDICTION

Respondent accepts Petitioner's Statement of Jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts Petitioner's listing of the pertinent portions of the United States Constitution, namely the Fifth, Sixth and Fourteenth Amendments thereto, involved in this petition.

STATEMENT OF THE CASE

Respondent directs this Court's attention to the facts as presented by the record, and synopsized by the Arizona Supreme Court, found in Exhibit A of the Petition for Writ of Certiorari, pages A-2 through A-8. Respondent would capsulize those facts as follows.

William Carl Mauro has a documented history of mental problems, including at least 10 hospitalizations from 1970 through February of 1982. Several of these hospitalizations were quite lengthy, ranging up to several months, despite Petitioner's characterization of these hospital stays as brief. Mauro's most recent hospitalization, nine months prior to the death of his son occurred in Flagstaff, Arizona; however, his mental problems arose substantially before this.

Respondent and his family were very

transient, moving before Mauro could be hospitalized for longer periods of time, and these hospitalizations were in a half a dozen different states.

Mauro's mother had a diagnosed history of bipolar affective disorder, formerly known as manic depressive. Interestingly, William Mauro was diagnosed with the same disorder, as testified to at trial by Mauro's treating psychiatrist. Thus, Mauro's mental state as demonstrated at trial, indicates an individual who was continuously and seriously disturbed prior to the death of David Mauro.

Bill Mauro's behavior had been acting bizzare for four days prior to David's death. Specifically, Mauro was convinced that space creatures were outside the family trailer, waiting to take the souls of his family; he paced the floor all night, was restless and sleepless, "pleading the blood;" his sister-in-law, a

witch, had come in spirit to take over his wife's soul; and he repeatedly rolled around on the floor. For those four days prior to his death, little David had been kept under the bathroom sink, in a cabinet.

On the morning of November 23, 1982, David Mauro died of suffocation. William Mauro placed his body in a suitcase, and left the house. It was a very cold November morning; nevertheless, Mauro wore neither shoes nor coat, which attracted the attention of his neighbors.

After burying the suitcase under a cross of logs in an open field, Mauro went to a nearby K-Mart store. Five or six employees testified that Mauro appeared crazy and delirious; one even said he was foaming at the mouth.

The police arrived, and Mauro continued to claim to have killed his devil-possessed son. He lead the police

to the logs in the field. Partially because of Mauro's bizarre behavior, the police suspected a bomb-hoax. Instead, David's body was discovered, and Mauro was arrested.

Mauro was advised of his Miranda rights, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) in the police car shortly after the body was discovered and once again after arriving at the station. Mauro stated that he did not wish to speak to the police without his attorney present.

Linda Mauro arrived shortly after her husband, and was interrogated in a separate room, at which time she informed the police of Mauro's mental illness history, and of his particularly bizarre behavior during the past four days and shortly after David's death. At the end of questioning, she asked to see her husband.

Detective Frank Manson approached Detective Byron Allen about this unusual request. Manson was against the visit, but Allen allowed it, under the condition that Manson be present and that the conversation be tape-recorded. Linda Mauro agreed to these conditions but Bill Mauro was never informed of them.

When asked why he wanted Manson present, Detective Allen stated it was for security reasons. Allen was still "in the dark" about what happened and he did not want the two to get together and concoct their stories. When asked why the conversation was tape recorded, both Allen and Manson testified that they were aware that Bill or Linda or both might make incriminating statements, and they wanted to record any of those statements. There is no showing by the State that supports any finding that security required an officer to be within listening distance of

the Mauros with a tape recorder running. Clearly, the purpose of the State was to use the face to face confrontation of William and Linda Mauro to elicit incriminating statements.

The Arizona Supreme Court, on direct appeal, reversed the convictions and death sentence of William Carl Mauro, holding that the police officers' conduct in allowing the conversation to even commence was an illicit custodial interrogation, under the "functional equivalent interrogation" test found in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Respondent disagrees with Petitioner's interpretation of the Arizona Supreme Court's holding when Petitioner urges that the Arizona Supreme Court found Wainwright v. Greenfield, 474 U.S. _____, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) as precluding the use of all Miranda-violative statements. The Arizona

Supreme Court did not use Greenfield to make this finding, instead, the Court only ruled that the tape should be suppressed as a violation of Respondent's Miranda rights.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied, inasmuch as the State of Arizona has failed to show any conflicting decisions from other jurisdictions or from this Court where the facts are substantially similar. Clearly, the Arizona Supreme Court's decision falls squarely within the reasoning of this Court in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), in holding that the police conduct was the functional equivalent of interrogation, prohibited by Miranda.

The Arizona Supreme Court did not use Sixth Amendment principles to define the scope of interrogation, as contended by the Petitioner. Further, the Arizona Supreme Court did not hold that the tape recording should be excluded because of due process considerations announced recently in Wainwright v. Greenfield, 106

S.Ct. 634 (1986). The tape was excluded because it violated this defendant's right against self incrimination.

Aside from the lack of conflict, and the correctness of the Arizona Supreme Court's decision, Respondent contends that this case is peculiar in its facts, and that relatively few people would ever be affected by a review of this matter by this Court.

The Arizona Supreme Court found that Mauro's Fifth Amendment rights were violated when the police officers allowed the conversation between the Mauros to commence. That Court recognized that the Fifth Amendment right to counsel is a protection against self-incrimination, citing United States v. Gouveia, _____ U.S. _____, 104 S.Ct. 2292, (1984). That Court further recognized that when a suspect in a custodial interrogation setting invokes his Miranda rights, all

questioning must cease. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

It is clear that Mauro was in a custodial setting at the time of the conversation with his wife, as he had already been arrested, given Miranda warnings twice, and had invoked his right to silence until counsel was present. The question before the Arizona Supreme Court was whether the police officer's conduct amounted to interrogation or its functional equivalent.

In Rhode Island v. Innis, 446 U.S. 291, this Court addressed, for the first time, the meaning of interrogation under Miranda. From that case, interrogation is defined as not only direct questioning, but indirect practices which create an interrogation environment. Id. at 300. Thus, interrogation also refers to

> "any words or actions on the part of the police (other than those normally

> attendant to arrest and custody) that the police should know are reasonably likely to illicit an incriminating response from the suspect." Id. at 301.

In determining whether conduct amounts to the functional equivalent of interrogation, the intent of the police officer and the perception of the suspect are scrutinized. In cases where the trial court must determine whether the officer should have known that his conduct was reasonably likely to elicit an incriminating response, this Court focused on the perceptions of the suspect, rather than the officer's intent. Id. This focus was designed to protect suspects against coercive police practices without placing on them the onerous burden of objectively proving police intent.

However, in footnote 7 of Rhode Island v. Innis, 446 U.S. at 301, the police intent element is not destroyed.

> "This is not to say that the intent of the police is

> irrelevant, for it may well have bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."

The Arizona Supreme Court, based on the testimony of Detectives Allen and Manson, concluded that their intent was crystal clear. Indeed, the illusive objective testimony of intent, which caused this Court to focus on the suspect's perceptions, was actually present in this case, and so strong that it was unnecessary to discuss Mauro's perceptions. However, that state court also recognized that Mauro may well have been unusually disoriented or upset and the police officers may have known that his mental state may have made Mauro

particularly susceptible to this police practice.

Petitioner attempts to claim that the Arizona Supreme Court pinned the Sixth Amendment standard on a Fifth Amendment violation, and that, somehow, use of that standard was incorrect. Petitioner contends that the Arizona Court used the reasoning of Maine v. Moulton, 474 U.S. ____, 106 S.Ct., 477 (1985) to arrive at the conclusion that Mauro's privilege against self-incrimination was violated. A review of that Court's opinion clearly indicates that the reasoning was based upon Fifth Amendment principles, and interrogation was defined by Rhode Island v. Innis, a Fifth Amendment case.

The Arizona Court further explained the rights of a suspect by applying the language in Maine v. Molton, supra, which says that police should not knowingly exploit situations. Obviously, the Court

was highly incensed by the actions of the police officers, and wanted to send a clear message that such conduct was improperly exploitive. Law enforcement should not be able to do indirectly what they cannot do directly. The Arizona Supreme Court also emphasized the control that the Flagstaff police had was also exploitive.

Petitioner would have this Court believe that police officers may not knowingly exploit suspects once the right to counsel under the Sixth Amendment has attached, but may knowingly exploit suspects once the Fifth Amendment right to counsel has been invoked. The Fifth and Sixth Amendments cannot exist in separate vacuums, and the use of a case involving the rights protected under one Amendment is often quoted in a case involving rights protected under another. See, e.g. United States v. Henry, 447 U.S. 264, 100 S.Ct.

2183, 65 L.Ed.2d 115 (1980), Powell concurring. Such a narrow view of constitutional law would constrain courts needlessly.

In Maine v. Moulton, supra, a case wherein Sixth Amendment violations were found, this Court discussed the situation wherein the police and a co-defendant set up Moulton with the use of a concealed wire transmitter. Even though the case was decided upon Sixth Amendment grounds, since the police's knowing exploitation occurred after the Sixth Amendment right to counsel had attached, the same considerations as found in Rhode Island v. Innis, supra, were applied. Footnote 12, 106 S.Ct. at 487, states:

> "Direct proof of the State's knowledge will seldom be available to the accused. However, as Henry makes clear, proof that the State "must have known" that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation. See

Henry, 447 U.S., at 271, 100 S.Ct. at 2187."

Lastly, Petitioner attempts to read the Arizona Supreme Court's decision to hold that all Miranda-violative statements are inadmissible after this Court held, in Wainwright v. Greenfield, supra, that post-arrest, post-Miranda warnings silence may not be used as evidence of sanity. Respondent contends this is an incorrect interpretation of the Arizona Supreme Court's opinion. In fact, just the opposite is true.

The Arizona Supreme Court, in footnote 1, p. A-33 of Petitioner's Exhibit A, specifically notes that perhaps some of the statements may (or some may not) be violative of due process rights as deliniated in Greenfield. However, the entire conversation was eliminated, so each individual statement did not need to be analyzed.

However, the Arizona Supreme Court

did want to give some direction to the trial court as to what could be done with this conversation. That Court held that the tape could not be used as evidence at trial; it could be used, however, by the psychiatrists determining Mauro's sanity at the time of the crime. That Court further desired to set the parameters for use of the tape when it directed the trial court to allow the state to carefully frame its questions to avoid any mention of Mauro's exercise of any constitutional rights, or any violations of Mauro's constitutional rights.

This rationale was based upon Greenfield, and the Arizona Court held that it would be fundamentally unfair for the state to use the words of the defendant when the tape had been excluded. The state may bring out, however, that Mauro was able to speak rationally. Again the state is attempting to do indirectly

what it cannot do directly - introduce the words of the tape when the tape has already been properly excluded.

CONCLUSION

This Court should deny the State of Arizona's Petition for Writ of Certiorari. No conflicting decisions from other jurisdictions have been brought to this Court's attention. Further, the decision of the Arizona Supreme Court was clearly correct, under Rhode Island v. Innis. The conduct of the police officers blatantly amounted to the functional equivalent of custodial interrogation, since the officers, by their own testimony, clearly knew allowing the conversation between Mauro and his wife was reasonably likely to elicit incriminating responses from Mauro, his wife or both. Mauro's perceptions were not even considered, so clear was the intent.

The case was not decided on improper grounds merely because a Sixth Amendment case, Maine v. Moulton, was used to condemn the knowing exploitation by police

of an opportunity they ordinarily would not have. The case was decided squarely on Fifth Amendment principles, as being Miranda-violative.

Lastly, there was no extention of Wainwright v. Greenfield to exclude all Miranda-violative statements based upon due process grounds. The statements were excluded because of Fifth Amendment grounds. However, Petitioner attempts to circumvent that ruling by saying that the statements should be admitted to show evidence of sanity - again an attempt to do indirectly what it cannot do directly.

Respectfully submitted,

RATNER & WALSH

By Kathleen Kelly Walsh
Kathleen Kelly Walsh

Attorneys for RESPONDENT

A F F I D A V I T

STATE OF ARIZONA)
) ss.
County of Coconino)

KATHLEEN KELLY WALSH, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That she served three copies of the Brief in Opposition upon Georgia Butcher Ellexson, Assistant Attorney General, Department of Law, 1275 West Washington, Phoenix, Arizona 85007, Attorney for State of Arizona, by depositing the same in the Unites States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, she herewith certifies that service of three copies of this Brief has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General, Department of

Justice, Washington, D.C. 20530.

Kathleen Kelly Walsh

KATHLEEN KELLY WALSH
121 East Birch Avenue
Suite 22176
Flagstaff, Arizona 86002
Telephone: (602) 774-5296

SUBSCRIBED AND SWORN to before me this 16 day of July, 1986.

Michelle Ratner

MICHELLE RATNER
NOTARY PUBLIC

My Commission Expires:

November 19, 1986

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-2121

In The

Supreme Court of the United States

October Term, 1985

STATE OF ARIZONA,
Petitioner,

vs.

WILLIAM CARL MAURO,
Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

JOINT APPENDIX

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

JOHN VERKAMP
Coconino County Attorney

GEORGIA B. ELLEXSON*
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 255-4686

Counsel for PETITIONER

KATHLEEN KELLY WALSH*
BREWSTER & WALSH
9 West Cherry, Suite B
P. O. Box 22176
Flagstaff, Arizona 86002
Telephone: (602) 774-5165

Counsel for RESPONDENT

*Counsel of Record

PETITION FOR CERTIORARI FILED JUNE 13, 1986
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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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SUPERIOR COURT OF ARIZONA
COUNTY OF COCONINO

Criminal No. 10056

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
Nov 30, 1982	1	GRAND JURY INDICTMENT
Nov 14, 1983	510	[DEFENDANT'S] MOTION TO SUPPRESS STATEMENTS
Dec 14, 1983	691	STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS
Dec 20, 1983	810	[DEFENDANT'S] REPLY IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS
Feb 3, 1984		MINUTE ENTRY [ADMITTING EXHIBIT 39]
Feb 10, 1984	1432	VERDICT: GUILTY OF CHILD ABUSE AS A DANGEROUS OFFENSE
Feb 10, 1984	1433	VERDICT: GUILTY OF FIRST-DEGREE MURDER
May 30, 1984	2073	NOTICE OF APPEAL

SUPREME COURT OF ARIZONA

DATE	NR.	PROCEEDINGS
Feb 25, 1986	23	OPINION—REVERSED AND REMANDED
Mar 12, 1986	24	[STATE'S] MOTION FOR RECONSIDERATION
Apr 2, 1986	25	APPELLANT'S RESPONSE TO MOTION FOR RECONSIDERATION
Apr 15, 1986	26	ORDERED: MOTION FOR RECONSIDERATION—DENIED
Apr 18, 1986	27	ORDER REVERSING AND REMANDING (MANDATE)

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA, Plaintiff,
vs.
WILLIAM CARL MAURO, Defendant.

No. 10056

MOTION TO SUPPRESS STATEMENTS

[Evidentiary Hearing and Oral Argument Requested]

The defendant, WILLIAM CARL MAURO, by and through his attorney, undersigned, and pursuant to Rule 16.2 of the Arizona Rules of Criminal Procedure, the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, Article II, Section 4, and Article II, Section 24 of the Arizona Constitution, moves this Court for an order suppressing any and all statements allegedly made by the defendant to law enforcement officers.

This motion is based upon the fact that the statements were not voluntary, the actions of the interrogating officers violated the defendant's right to counsel and the statements were obtained in violation of the *Miranda* decision, all as more fully set forth in the attached Memorandum of Points and Authorities.

DATED this 11 day of November, 1983.

ASPEY, WATKINS & DIESEL

By: /s/ Frederick M. Aspey
Attorney for Defendant, Mauro

MEMORANDUM OF POINTS AND AUTHORITIES

The State has made discovery to the defendant and a review of the police reports indicates that the State will

be offering various statements allegedly made by the defendant to law enforcement authorities. These statements can be conveniently classified as follows:

1. Statements made by the defendant at K-Mart and while being transported by the Flagstaff Police Department.
2. Statements made by the defendant at the Flagstaff Police Station.
3. Statements made by the defendant to Detective Manson and Detective Trimble.
4. Statements made by the defendant to various jail personnel.

Before such statements may be introduced into evidence at trial, the State must first establish compliance with the *Miranda* decision. *Miranda v. Arizona,* 384 U.S. 436 (1966). Under this decision, the defendant must be advised of the following:

1. The defendant has a right to remain silent.
2. Any statements made by the defendant can and will be used against him in court.
3. That the defendant has a right to consult with an attorney and have him present during any interrogation.
4. That if the defendant is indigent, the court will appoint a lawyer to represent him.

In addition to the specific procedures required by the *Miranda* decision, the State must also demonstrate that statements made by the defendant were "voluntarily" made. *State v. Emery,* 131 Ariz. 493, 642 P.2d 838 (1982). *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961). Involuntary statements are inadmissible for three reasons. First,

such confessions, particularly those coerced by brutality or threats, are inherently unreliable. *Brown v. Mississippi,* 297 U.S. 278 (1936). Second, police techniques which are used to obtain confessions are themselves a part of the "Process" which is subject to evaluation under the Due Process Clause of the Fourteenth Amendment. Coercive police techniques are contrary to the concept of "fundamental fairness" which is the cornerstone of the Due Process Clause. *Spano v. New York,* 360 U.S. 315 (1959). Third, the United States Supreme Court has found that Due Process is also violated when a confession is not the free and rational choice of the Defendant. *Haines v. Washington,* 373 U.S. 503 (1963).

Under Arizona law, statements or confessions by an accused are prima facie involuntary and the State has the burden of proving the voluntariness of such statements. *State v. Edwards,* 111 Ariz. 357, 529 P.2d 1174 (1974); *State v. Holden,* 88 Ariz. 43, 352 P.2d 705 (1960). The strict requirements of the *Miranda* decision apply to any statements made by a defendant in response to police questioning following an arrest or when a suspect is ". . . otherwise deprived of his freedom of action in any significant way." *Orozco v. Texas,* 394 U.S. 324 (1969). Even assuming that a defendant understands the nature of the specific rights to counsel and silence as required by the *Miranda* decision, subsequently made statements are still inadmissible unless the record indicates a knowing and intelligent waiver of these constitutional rights. Moreover, a waiver cannot be found from the mere fact that the statements were ultimately obtained. To the contrary, courts must indulge in every inference against finding a waiver. *North Carolina v. Butler,* 441 U.S. 369

(1979). In addition, any finding of waiver must be supported by evidence of a knowing, intelligent and understanding relinquishment of these rights. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *Johnson v. Zerbst,* 304 U.S. 458 (1930).

Under Arizona Law, a defendant's statements to law enforcement authorities will be deemed involuntary if the court determines (1) the existence of impermissible conduct by the police, (2) coercive pressures which have not been properly dispelled, or that (3) the statement was derived from an earlier involuntary confession. *State v. Emery,* supra at page 847; *State v. Gretzler,* 126 Ariz. 60, 82, 612 P.2d 1023, 1045 (1980); *State v. Steelman,* 120 Ariz. 301, 309, 585 P.2d 1213, 1221 (1978). A heavy burden rests with the state if it intends to offer a defendant's statements at the time of trial. Our Supreme Court has held in *State v. Knapp,* 114 Ariz. 531, 561 P.2d 704 (1977) at p. 538:

> Confessions are prima facie involuntary and the burden is on the State to show a confession was freely and voluntarily made. [Citations omitted.] That burden is by a preponderance of evidence, [Citations omitted.] Courts must look to the totality of the circumstances surrounding the giving of the confession presented to them at "voluntariness hearings" and decide whether the State has met its burden.

In the case at hand it is respectfully submitted that the State will not be able to carry its burden and that all statements allegedly made by the defendant to law enforcement authorities must therefore be suppressed.

STATEMENTS AT K-MART AND DURING TRANSPORTATION

As was noted in the beginning of this Memorandum, the defendant is alleged to have made statements to law enforcement authorities at K-Mart and, thereafter, while being transported by the Flagstaff Police. It is the defendant's position that he was psychotic at this time and that, therefore, all statements allegedly made by him to law enforcement authorities must be suppressed. When a suspect is suffering from some type of physical disability, regardless of its cause, the voluntariness of statements made by the individual is brought into question. On a number of occasions, the United States Supreme Court has held that suspects who suffered injury or who were ill were incapable of making voluntary confessions. *Jackson v. Denno*, 378 U.S. 368 (1964) [Defendant suffering from a bullet wound]; *Beecher v. Alabama*, 408 U.S. 234 (1972) [Defendant wounded and sedated with Morphine]; *Ziang Sung Wan v. U.S.*, 266 U.S. 1 (1924) [Defendant, sick with influenza and a chronic stomach disorder, denied medical treatment]; *Leyra v. Denno*, 347 U.S. 556 (1954) [Defendant had sinus condition that caused him extreme pain] *Mincey v. Arizona*, 437 U.S. 385 (1978) [Defendant in pain from a bullet wound and had a tube down his throat and was under sedation].

Such holdings are not limited to physical injury alone. The United States Supreme Court has long expressed a strong distaste for the use of confessions from persons suffering from mental illness. In the leading case of *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960) the United States Supreme Court held that a confession obtained from an individual who was psychotic at

the time was involuntary and inadmissible. In *Blackburn* the court stated at pps. 248-249:

> In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. *Surely in the present stage of our civilization a most basic sense of justice is afronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane;* and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion. (Emphasis Added)

In the case at hand, testimony will be presented that at the time that the statements were made to the law enforcement authorities at K-Mart and subsequently during his transportation that the defendant was psychotic. Under these circumstances, these statements must be suppressed because they were involuntary. *Blackburn*, supra.

. . .

STATEMENTS MADE AT THE POLICE STATION

The defendant is also alleged to have made statements to his wife while at the Flagstaff Police Station. The defendant was transported from the scene of his arrest to the police station by Detective Trimble and Captain Latham. The defendant was suffering from manic depressive illness and, on occasion, actively psychotic. Upon their arrival at the police station at 10:45 a.m. on November 23, 1982, the defendant was advised on his *Miranda* rights by Detective Trimble. At that time the defendant told the officers that he did not wish to make any

statements without the presence of an attorney. It is now absolutely clear that if a person who is subjected to custodial interrogation invokes his right to remain silent that the interrogation must cease. In *State v. Finehout,* 665 P.2d 570 (1983) at p. 573, the Arizona Supreme Court quoted from the *Miranda* decision as follows:

> * * * If the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.
>
> * * * * * * *
>
> * * * If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of the compulsion, subtle or otherwise. Without the right to cut-off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Thus, it is clear that once Mr. MAURO invoked his right to remain silent that any further interrogation should have ceased.

The defendant's wife, Linda Ann Mauro, asked to come into the interrogation room and speak with the defendant. During this conversation, Detective Manson tape-recorded what was said. This investigative technique was clearly improper and was obviously utilized by Detective

Manson in an attempt to avoid the hurdles presented by the *Miranda* decision. Police trickery and deception in obtaining confessions are common law enforcement techniques but ones which have long been criticized by the United States Supreme Court. In the *Miranda* decision, the Supreme Court was especially critical of police trickery as a technique capable of overbearing the will of the suspect. In particular, the court criticized such techniques as the "Mutt and Jeff" interrogation in which a supposedly sympathetic interrogator promises to protect the suspect from a hostile interrogator if that suspect would only cooperate. The Court also condemned the police practice of placing the suspect in a fake line-up for a nonexistent crime, where he is identified by the "victim." He is then threatened with prosecution unless he confesses to the crime for which he is really under investaigation. In *Leyra v. Denno*, supra, the Supreme Court found a confession involuntary when it was elicited from the defendant by a police psychiatrist who told the defendant he was a doctor there to help him. A similar decision resulted in *Spano v. New York*, supra. In *Spano*, the defendant was questioned by a police officer who was a close friend of the accused. Upon instructions from his superiors, the officer told the defendant that the officer would be in trouble unless the defendant confessed. The court had no trouble finding the confession under these circumstances to be involuntary.

A similar form of deception occurs when the police deceive a suspect about whether an interrogation is actually taking place. A classic example of this deception occurred in *Massiah v. United States*, 377 U.S. 201 (1964). In *Massiah*, the defendant and his confederate, Colsen,

were arrested and indicted for possession of narcotics aboard a United States vessel. After both were released on bail, Colsen, without the defendant's knowledge, agreed to cooperate with the government in their efforts to obtain further information relating to the offense. Equipped with a translator which broadcasted conversations held in his automobile to another government agent, Colsen engaged in a lengthy conversation with the defendant. At the defendant's trial, incriminating statements made by him during this conversation were introduced into evidence. The court disapproved of this process and held the statements inadmissible. Lower courts when faced with this type of deception have also held similar statements inadmissible. See, *Commonwealth v. Bordner,* 432 Pa. 405, 247 A.2d 612 (1968) [Statements inadmissible when police engaged defendant's parents to elicit incriminating statements from defendant while he was in the hospital]; *State v. Travis,* 116 R.I. 678, 360 A.2d 548 (1976) [Statements inadmissible when police placed undercover policemen in defendant's cell shortly after his arrest and defendant had already refused to talk to police before seeing an attorney.] Normally, the statements made by the defendant to his wife would be privileged. Detective Manson sought to avoid this privilege as well as the holding in the *Miranda* decision by listening to and taping the conversation. This technique amounted to "police trickery" and should not be allowed. The statement should therefore be suppressed.

Detective Manson's actions also violated the defendant's right to be free from interrogation until such as he had consulted with his attorney. In *State v. Finehout,* supra, the Arizona Supreme Court was faced with a situation where a defendant told the police that "I'm not going

to say anymore until I talk to an attorney." The Court found the statements inadmissible and held at p. 574 that:

> We believe this to be a unequivocal request for an attorney which triggers the *Miranda* right to be free of interrogation until a person in custody has consulted with a lawyer.

In this case, the defendant clearly told the officers that he did not wish to speak to them until such time as an attorney was present. The subsequent taping of the interview between the defendant and his wife was the functional equivolent of further interrogation and should not be allowed. Detective Manson should not have continued to try and interrogate the defendant until such time as the defendant had consulted with counsel. *Edwards v. Arizona,* 451 U.S. 477 (1981); *Rhode Island v. Innis,* 446 U.S. 291 (1980); *Michigan v. Mosley,* 423 U.S. 96 (1975).

STATEMENTS MADE TO DETECTIVE MANSON AND DETECTIVE TRIMBLE AT THE COCONINO COUNTY JAIL

On at least one and perhaps two occasions, Detective Manson visited the defendant in the Coconino County Jail and had conversations with him. Detective Trimble also had a conversation with the defendant at the jail. On each of these occasions, the officers failed to advise the defendant of his *Miranda* rights. The obvious purpose of the visits was to obtain further incriminating statements from the defendant. The defendant was clearly "in custody" and the Detectives' actions amounted to "interrogation". In *State v. Finehout,* supra, the Arizona Supreme Court quoted the definition of "interrogation" set forth by the United States Supreme Court in *Rhode Island*

v. Innis 446 U.S. 291 (1980). The Court held that interrogation:

> Refers not only to express questioning, but also to any words or actions on the part of the police [other than those normally attendant to arrest and custody] that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. *A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.* But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." [Emphasis Added].

In the case at hand, when Detective Manson and Detective Trimble went to the County Jail to speak to the defendant, they either knew or reasonably should have known that their actions were likely elicit an incriminating response. The defendant was suffering from manic depressive illness and at times was actively psychotic. The defendant was not advised of his *Miranda* rights and his attorney was not present. His rights to "cut off questioning" were not "scrupulously honored" and any statements made during these occasions must therefore be suppressed. See *Michigan v. Mosely*, 423 U.S. 96, (1975). The most disturbing aspect of the officers' conduct is that they

failed to consult with defense counsel prior to their conversations with the defendant. Clearly, they knew that defense counsel had been appointed to represent the defendant and that defense counsel would not have desired the defendant to speak with them. The United States Supreme Court has held that confessions and admissions elicited from a suspect after the right to counsel has attached must be suppressed if the incriminating statements were elicited without the presence of counsel or without a proper waiver by the suspect of his right to counsel. *Brewer v. Williams*, 430 U.S. 387 (1977). Therefore, all statements made by the defendant to Detective Manson and Detective Trimble must be suppressed. *Brewer*, supra.

STATEMENTS TO JAIL PERSONNEL

Finally, the State has indicated that it intends to offer various statements made by the defendant to deputy sheriffs while the defendant was incarcerated in the Coconino County Jail. The defendant is informed and does therefore believe that on none of these occasions was he ever advised of his *Miranda* rights. Moreover, none of the deputy sheriffs ever attempted to contact defense counsel prior to the conversations. Bearing in mind the defendant's mental health condition, the statements were clearly not voluntary. Under the circumstances, it is respectfully submitted that the State will not be able to carry its burden. The statements are involuntary, in violation of the *Miranda* decision and violated the defendant's right to counsel. These statements must therefore be suppressed as well.

DATED this 11 day of November, 1983.

ASPEY, WATKINS & DIESEL
/s/ By FREDERICK M. ASPEY
Attorney for Defendant

Copy of the foregoing delivered
this 11 day of November, 1983, to:

Mr. Mike Prost
Mr. Charles D. Adams
Coconino County Attorneys Office
Coconino County Courthouse
Flagstaff, Arizona 86001

/s/ By Frederick M. Aspey

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA IN AND FOR
THE COUNTY OF COCONINO

THE STATE OF ARIZONA,
Plaintiff,
vs.
WILLIAM CARL MAURO,
Defendant.

No. 10056

STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

(Filed December 14, 1983)

The Plaintiff STATE OF ARIZONA, by and through the attorneys undersigned, hereby respond to the Defendant WILLIAM CARL MAURO's Motion to Suppress Statements filed in the above case and request that said Motion be denied, based upon the ground that the Defendant was not interrogated at any time and that all statements made to the officers were volunteered by the Defendant, as more fully discussed in the following Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 14 day of December, 1983.

JOHN VERKAMP
Coconino County Attorney

By: /s/ Michael G. Prost
Deputy County Attorney

By: /s/ Charles D. Adams
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

Statement of Facts

On November 23, 1982, at about 9:30 a.m., Mr. Aaron Holck, the security manager of the K-Mart Department Store on 4th Street in Flagstaff, Arizona, called the Flagstaff Police Department at the request of an individual who was later identified as the Defendant WILLIAM CARL MAURO. The Defendant had entered the store about five minutes before and, in a very excited state, had made statements to at least six persons in the K-Mart Store to the effect that he had killed the devil, that his son was the devil, that he had killed his son, that it was in a suitcase in a field nearby, and insisting that the K-Mart personnel call the police so that he could show them where the suitcase was.

At 9:38 a.m., Officers Victor Gabilondo and Jerry Harris of the Flagstaff Police Department arrived in separate marked patrol vehicles at the K-Mart Store in response to Mr. Holck's call. Both officers were in uniform. The Defendant was in front of the store with three male K-Mart employees. When the two officers approached MAURO, he said, "I killed my son." The Defendant pointed to a field northeast of the K-Mart Store and requested the officers to take him there, so that he could show them where the suitcase containing his son was located.

The Defendant got into the back of Officer Gabilondo's patrol car, and both cars drove toward the field which the Defendant had indicated about 200 yards away. During transport, MAURO kept repeating statements similar

to the ones already made to the officers in front of K-Mart and similar to the statements MAURO had made to the K-Mart employees. With his right arm, MAURO pointed to a pile of dead tree trunks and limbs in the middle of the field and indicated to Officer Gabilondo that that was was where the suitcase could be found. Both cars stopped and the officers searched the area of the woodpile for several minutes, but could not find any suitcase.

When Officer Harris informed MAURO that they could not find the suitcase, MAURO started screaming that he had killed his son and said, "I did it, I'll take the rap, I'll show you where it's at, handcuff me if you want to, I'm not gong to hurt anyone!" He then got out of the patrol car and he was handcuffed by Officer Gabilondo. They asked MAURO how old his son was, and he replied that his son was seven years old. When asked his address, MAURO refused to give any further information until the officers located the suitcase. MAURO then walked slowly to a particular point in the middle of the woodpile, with both officers walking behind him, and nodded with his head stating, "Right there, it's right there." While walking toward the pile of logs, the Defendant made several statements about being executed or placed into prison for what he had done, but that he "had to do it."

At the place MAURO had indicated, the officers could see a neat pile of smaller logs and branches stacked up between two large logs. Officer Harris began removing the logs and MAURO again became quite excited and loudly insisted that he should hurry up and open the suitcase. After the pile of logs had been partially removed,

Officer Harris observed a small, gray two-suiter suitcase, which was tightly latched.

Neither of the officers believed that the small suitcase could possibly contain the body of a seven-year-old child. Because of MAURO's suspicious conduct, and his insistence that the officers open the suitcase immediately, the officers suspected that the suitcase might contain an explosive device, and they decided to have it examined by a bomb technician before opening it. At 10:04 a.m. Lt. J. T. McCann, Capt. Gary Latham, Det. Sgt. Byron Allen and Det. Frank Manson arrived at the field, and MAURO was placed in the back of Officer Gabilondo's patrol car.

Gabilondo then drove MAURO to a residence in East Flagstaff in order to account for all of the MAURO children, but it turned out to be the wrong address. During the ride, MAURO carried on a conversation with Officer Gabilondo. MAURO's statements were similar to those already made to both the officers and the people at K-Mart.

In the meantime, back at the field, Lt. McCann carefully examined the suitcase, and upon opening it he saw the dead body of a little boy inside, who was later identified to be MAURO's seven-year-old son David.

As soon as the body was discovered, Gabilondo was ordered to transport the Defendant back to the field, where upon Det. Sgt. Byron Allen placed him under arrest for murder and informed him of his Miranda rights. The Defendant said that he understood his rights, and Sgt. Allen made no attempt to question him.

Up until the time when the body was discovered, the Flagstaff Police did not have probable cause to arrest the

Defendant upon any criminal charge, let alone first degree murder and child abuse. Until then, the activities of the police officers were investigatory only. The summoning of the police to K-Mart, the placing of MAURO in Gabilondo's patrol car, the drive to the field, and the search for the suitcase were all done by the police at MAURO's insistence and request, which he repeated over and over again. During this period, the police did not interrogate Mr. MAURO, and any statements he made were volunteered. E.H. 11/30/83, pages 258-268; 270-380; 293-306 and 324-331.

After his arrest, MAURO was placed in Capt. Latham's vehicle and driven to the Flagstaff Police Department, accompanied by Capt. Latham and Lt. McCann, for the purpose of taking photographs and obtaining any evidence that might exist on his person. No conversation between them took place during the ride back to the police station. Upon arrival at the police station, MAURO was ushered into Capt. Latham's office and advised of his Miranda rights by Capt. Latham and Det. Billy Trimble. MAURO said that he understood his rights and did not wish to talk to the police without an attorney. This interchange was tape-recorded, and no further interrogation took place.

Capt. Latham's office is not a secure area, and an officer was stationed with the Defendant in order to guard him at all times.

In the meantime, Det. Sgt. Allen and Det. Frank Manson located the correct address of the Mauro residence, and told the Defendant's wife Linda Ann Mauro that her son was dead and that her husband was under arrest for

murder at the Flagstaff Police Department. Mrs. Mauro agreed to accompany them to the station in order to give a statement.

At the station, Det. Manson informed Mrs. Mauro of her Miranda rights. She waived her rights and agreed to an interview by the detective. Det. Manson concluded the interview after about an hour. At that time, Mrs. Mauro requested that she be allowed to speak to her husband. Det. Manson attempted to discourage her because she was so emotionally distraught and upset, but Mrs. Mauro insisted that she be allowed to speak to her husband. Det. Manson discussed the matter with his supervisor, Det. Sgt. Byron Allen, who said he would allow Mrs. Mauro to see her husband, but instructed Det. Manson to inform her that she could not see him alone, that Det. Manson would have to be present, and that any statement between the two would be tape-recorded. Mrs. Mauro agreed to see her husband under these conditions. Mrs. Mauro and Det. Manson went into the office where Mr. MAURO was handcuffed, and Det. Trimble left the room. The door was kept open. The conversation between Mr. and Mrs. Mauro lasted about five minutes and was tape-recorded by Det. Manson with a tape recorder that he held in plain view about three or four feet from Mr. and Mrs. Mauro. E.H. 11/30/83, pages 331-340 and 351-354; and E.H. 12/1/83, pages 421-433 and 437-439.

About an hour later, MAURO was photographed, evidence was taken from beneath his fingernails, his clothing was taken as evidence, he was fingerprinted, and then Officer Gabilondo transported MAURO to the Coconino County Jail, where he was booked on a charge of First Degree Murder.

During his stay at the Flagstaff Police Department on November 23, 1982, the Defendant WILLIAM CARL MAURO was not interrogated by the police at any time.

DEFENDANT'S STATEMENTS PRIOR TO ARREST

The Defendant wants to suppress all of the statements made to Officers Gabilondo and Harris prior to his actual arrest, which took place at approximately 10:30 a.m. on November 23, 1982. His argument in this regard is two-fold. First, he claims that the statements were obtained in violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, even though the statements were made prior to his arrest. The second prong of Defendant's argument is that his mental state renders his pre-Miranda statements involuntary. Neither theory has merit.

The Miranda Issue

Defendant's *Miranda* argument must fail for two very obvious reasons: First of all, the officers were not interrogating the Defendant during this time, and all of the statements by the Defendant were volunteered. The officers had been summoned to the scene at the Defendant's own request, and it was the Defendant who insisted that the officers transport him to the field where the body of David Mauro was located.

The officers did not have probable cause to arrest the Defendant for any crime whatsoever, until the body of David Mauro was discovered by Lt. McCann approximately one hour later. The officers had no idea whether the Defendant had a son or whether his son was in fact dead.

Although MAURO was being detained, he was being detained merely for purposes for investigation, so that the officers could verify his statements concerning the death of his son.

Under these circumstances, an officer is not required to advise an individual of his Miranda rights.

The Supreme Court in the *Miranda* decision itself pointed out that, while suspects must be advised of their constitutional rights prior to undergoing custodial interrogation, such interrogations must be distinguished from general, on-the-scene investigations:

> "Our decision is not intended to hamper the traditional function of police officers in investigating crime . . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of a responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Miranda vs. Arizona*, 384 U.S. 436, 477-78 86 S.Ct. 1602 at 1629-30 (1966).

An example of this principle occurred in *State vs. Wynn*, 114 Ariz. 561, 562 P.2d 734 (1977). In that case, an officer saw the defendant engaged in suspicious activity next to a fenced lumber yard late at night, and he pulled Wynn's vehicle over in order to question him about a large roll of fencing wire in the back seat of his car. Although the officer admittedly stopped the defendant to ask him about his suspicious activities near a commercial yard at so late an hour, the Court found that:

> Without question appellant was temporarily deprived of freedom of action when he was stopped. Under the circumstances, the officer had a founded suspicion that criminal activity might be afoot and the stop was by no means unreasonable. *State vs. Ochoa,* 112 Ariz. 582, 544 P.2d 1097 (1976). However, the fact that an officer is suspicious of an individual is not the test of whether *Miranda warnings* must be given prior to questioning. *State vs. Bainch,* 109 Ariz. 77, 505 P.2d 248 (1973). Limited questioning during a reasonable investigatory detention is permissible where the confrontation has not reached the "interrogation stage." *State vs. Landrum,* 112 Ariz. 555, 544 P.2d 664 (1976); *State vs. Dean,* 112 Ariz. 437, 543 P.2d 425 (1975). The officer's questioning was non-accusatory in nature and was merely in furtherance of a proper preliminary investigation. The trial court was correct in permitting the statements into evidence. *Id,* 114 Ariz. at 564.

As the U.S. Supreme Court has noted in *Hoffa vs. United States,* 385 U.S. 293, 87 S.Ct. 408, at 417 (1966):

> " . . . The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall short of the amount necessary to support a criminal conviction."

This holding in *Hoffa* is applicable to Fifth Amendment protections as well as the Sixth Amendment right to counsel. *State vs. Hawker,* 25 Ariz. App. 93, 541 P.2d 419 (1975).

All of the police activities up to the point at which little David's body was discovered were merely investigatory and non-accusatory in nature. The officers were trying to check out the Defendant's rather bizarre story that he had killed his son, who was the "devil," and that his son was in a suitcase in a field nearby K-Mart. As soon as the body was discovered, the Defendant was immediately placed under arrest for murder and informed of his Miranda rights by Det. Sgt. Allen. The Flagstaff Police Department scrupulously observed those constitutional rights of the Defendant which were applicable prior to his actual arrest.

Furthermore, all of the statements made by the Defendant to Officers Harris and Gabilondo were volunteered. As the U. S. Supreme Court itself noted in the *Miranda* case:

> The fundamental import of the privilege [against self-incrimination] while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. *There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make.* Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding tod[illegible] *Miranda vs. Arizona*, 384 U.S. at 478; 86 S.Ct. at [illegible]0. (emphasis added).

Even if a suspect is in custody, any statement he makes voluntarily, without any interrogation, is admissible in evidence without Miranda warnings being given. *State v. Brewer*, 26 Ariz. App. 408, 549 P.2d 188 (1976). None

of the statements made by the Defendant to Officers Gabilondo and Harris were in response to interrogation. All of the statements were volunteered by the Defendant, and the admissibility of such statements is simply not governed by the *Miranda* rule.

Mental Condition

The Defendant also claims that he was "psychotic" at the time he made the statements and, for this reason alone, he argues that all such statements should be suppressed. He relies heavily upon the U. S. Supreme Court decision in *Blackburn vs. Alabama*, 361 U.S. 199, 80 S.Ct. 274 (1960), for this proposition.

Defendant's reliance on *Blackburn* is badly misplaced. First of all, that case does not hold that incriminating statements made by a person who is psychotic are inadmissible, *per se*. Secondly, *Blackburn* was an extreme example of police coercion and is easily distinguished on that basis, as other courts have done repeatedly when similar questions were presented.

In *Blackburn*, the Defendant had been classified by the Veterans Administration as 100% incompetent when the incriminating confession at issue was obtained. The defendant had committed the crime charged during a period of unauthorized absence from the V.A. Hospital's mental ward. He was relentlessly interrogated for eight or nine hours in a small room. At the end of that time, a sheriff's deputy composed a detailed confession in narrative form, and the defendant signed the statement two days later. The evidence indisputably established the strongest possibility that the defendant was insane and

incompetent at the time he confessed. Two doctors had determined that he was insane and a third doctor's testimony was inconsistent and unreliable. Initially, he was found incompetent and confined in the State Hospital for four years, until he was later determined to be competent to stand trial. Most important of all, the defendant's confession was the most damaging piece of evidence of guilt that the State had to offer in its case in chief. His conviction was reversed because the court found that his statements were involuntary.

In this case, the evidence is obviously in conflict on the question of MAURO's sanity. Furthermore, all of the Defendant's statements were volunteered and he was not subjected to interrogation by the police at any time. He was not an escapee from a mental institution when the crimes were committed, and the examining psychiatrists have both found him to be competent to stand trial. The coercive behavior by the police in *Blackburn* is simply not present in this case at all.

Since *Blackburn* was decided in 1960, the question of whether a defendant's mental condition precludes him from making voluntary statements, or giving a voluntary confession, has been considered by many courts. In the absence of improper police conduct or evidence "indisputably establishing the strongest possibility of insanity," the courts have consistently found statements made by an allegedly mentally ill defendant admissible. Indeed, there is no *per se* rule holding inadmissible confessions given by persons suffering severe psychotic conditions. *Gibbs vs. Warden of Georgia State Penitentiary*, 450 F.S. 242 (M.D. GA. 1979). For example, no rule of law says that

an individual who is a paranoid schizophrenic (Dr. Gerstenberger's initial diagnosis of this Defendant) may not give a perfectly voluntary confession. See, e.g., *Criswell vs. State,* 472 P.2d 342 (Nev. 1970). The mere existence of mental instability in a defendant does not require suppression of his incriminating statements. *People vs. Byrne,* 412 N.Y.S.2d 39, 41 (1978). The voluntariness of a defendant's statements is premised on the totality of the circumstances, *Sullivan vs. State of Ala.,* 666 F.2d 478 (11th Cir. 1982); *Blackburn vs. State, supra.* Even preivous hospitalizations for mental problems do not show that a defendant lacks the mental capacity to voluntarily confess to a crime. *State vs. Ortiz,* 422 P.2d 355 (N.M. 1967). A few examples of the many cases which have ruled on this issue are discussed below.

In *Allred vs. State,* 313 S.2d 195 (Ala. 1975), the defendant was tried and convicted of second degree murder for killing her husband, after she had spent time in a State Hospital in order to restore her competency to stand trial. The murder occurred by the side of a road, and several passers-by who stopped to investigate the situation overheard statements made by the defendant and observed her behavior. There was testimony to the effect that the defendant's appearance was disheveled and that she had a "crazy look on her face." In response to one witness's question as to what had happened, the defendant replied that her husband was beating her and she had shot him. The defendant made a similar incriminating statement to the police when they arrived on the scene. The defendant was the prime suspect, but her statements were made prior to her arrest. The defendant was subsequently arrested, taken to a police car and given her Miranda warnings.

She immediately requested a lawyer, and no further questions were propounded.

The defendant objected to the introduction of the statements to the police upon two grounds: 1) that they were obtained in violation of *Miranda;* and 2) that they were not the product of a rational intellect and free will. The court rejected both arguments.

It was clear from the record in *Allred* that the police officer did not ask the defendant any questions and that her statements were not made in response to anything he had said or done. The court found that the statements were spontaneous declarations and not the result of custodial interrogation. Thus, there was no *Miranda* violation and admission of the incriminating statements made prior to the defendant's arrest was not error.

The court also found the statements to be admissible despite the defendant's claim of involuntariness because of her mental condition. The court said that a person may be partially insane and still be competent to testify or make a confession. The court limited the *Blackburn* holding to its special facts. Specifically, the court said that the evidence in *Blackburn,* which "undisputedly established the strongest possibility that Blackburn was insane,' coupled with the lengthy custodial interrogation brought about the conclusion that Blackburn's confession had been involuntary.

There was no evidence of coercion or prolonged or improper police interrogation, unlike the situation in *Blackburn.* The court also found that the evidence of insanity was not compelling, even though the defendant had been institutionalized prior to the trial and several experts

had expressed their opinion that she was mentally disturbed.

The Federal Court of Appeals reached a similar result, based upon the same principles, in *Sullivan vs. State of Alabama, supra.*

The facts in the MAURO case are analogous and, based upon the same principles approved in the *Allred* and *Sullivan* cases, the spontaneous declarations by Mr. MAURO made to the police officers prior to his arrest on November 23, 1982, should be admitted in evidence. The Defendant was never interrogated by the police at any time on November 23, 1982. Although the Defendant was emotional and highly excited when the police first encountered him, he nevertheless understood the consequences of the statements and admissions that he was making to the police. Mere emotionalism and confusion does not dictate a finding of mental incompetence or insanity. *Sullivan vs. State of Alabama, supra.* After his initial encounter with the police, MAURO calmed down considerably, and under the circumstances, was quite rational. His statements were spontaneous declarations and, therefore, voluntary and should be submitted to the jury in the trial of this case.

Furthermore, during his testimony at the Evidentiary Hearing on December 2, 1983, the Defendant's psychiatrist, Dean L. Gerstenberger, M.D., testified that in his opinion all of the statements made by the Defendant on that date were voluntary, that he appeared to understand the consequences of making those statements and that as a psychiatrist, he can see no medical reason to preclude those statements from the jury's consideration at trial. Specifically, Dr. Gerstenberger testified as follows:

> Question: In your opinion as a psychiatrist, do you feel that all of the statements that I have just asked you about should be considered by the jury when they consider this case.
>
> Answer: It is my belief that they should. My own feeling is that I think the jury should be allowed access to the information so that they can evaluate it themselves. (TR 12/2/83, page 646.)

Although the doctor testified that the Defendant was still under the influence of psychosis, he testified that the Defendant had recovered sufficiently to understand the consequences of committing murder. E.H., 12/2/83, pages 647-648. Dr. Gerstenberger specifically testified that the Defendant appeared to understand the consequences of making the incriminating and unsolicited statement he made to Corp. Jerry Harris upon exiting the patrol vehicle in order to show him where the suitcase was located. E.H., 12/2/83, pages 648-649. According to Dr. Gerstenberger, by the time MAURO had arrived at the K-Mart store, when various incriminating statements were made, the Defendant "was much improved over his condition earlier when the crime was committed." See TR 12/2/83, Page 653, lines 11-17. Dr. Gerstenberger testified that, on his personal scale of psychosis, he would rate the Defendant's mental condition that morning on a level of two, which as he testified, indicates that the Defendant "was not nearly as psychotic as he had been earlier." See TR 12/2/83, page 654, lines 24-25. At no time did Dr. Gerstenberger indicate that the Defendant's mental state at K-Mart and thereafter was such that he was completely out of touch with reality. See TR 12/2/83, pages 652-659.

In *Gibbs vs. Warden of Georgia State Penitentiary, supra,* the Federal District Court upheld the admissibility of a confession, even though its voluntariness was challenged upon *Blackburn* grounds. The defendant had made her confession during custodial interrogation after a waiver of rights. The police in that case had repeatedly advised the defendant of her Miranda rights and there was no hint of improper compulsion. The defendant was subsequently found to have been mentally incompetent over a period of years, including the period of time during which she made the confession in question. Upholding the admissibility of the confession, the court specifically stated:

> . . . *there is no per se rule holding inadmissible confessions given by individuals suffering severe psychotic conditions.* Rather, a confession is inadmissible if it would not have been obtained but for the effects of the confessors psychosis. There is nothing unfair about using the admissions of a psychotic individual where the giving of the admissions is not substantially related to the effects of the psychosis. In such a case, no advantage has been taken of the individual's disability. 450 F.S. at 244. (Emphasis added).

There was nothing in the record of the *Gibbs* case to suggest that the defendant's will was overborn during her interrogation due to her diminished mental disability. The record in this case is even more compelling in this regard, since the Defendant's statements were volunteered without any interrogation by the police at all.

In the case of *State vs. Lujan,* 534 P.2d 1112 (1975), the New Mexico Supreme Court distinguished mental capacity to make a confession from the defense of insanity.

The court explained that even though a defendant might be legally insane, thus raising a defense to a criminal charge, he still might be legally competent to make a valid confession. 534 P.2d at 1113. The test according to *Lujan* is whether the defendant had sufficient mental capacity at the time of the confession to be conscious of what he was doing, to retain memory of his actions and to relate with reasonable accuracy the details of his actions. Mere mental instability or temporary lack of faculties only goes to the weight to be given a confession, not to its admissibility.

In this case, the facts show that Defendant MAURO was relatively calm, although understandably agitated from time to time, throughout his detention and later custody by the Flagstaff Police Department. He was oriented as to time and place, he knew him name, he was able to lead the police directly to where his son's body was located, he was aware of where he lived, and how old his son was, and most important of all. he demonstrated repeatedly and unequivocally his understanding of his right to remain silent and his right to counsel.

There is a legitimate dispute here as to whether or not the Defendant was suffering from a psychosis, a paranoid schizophrenic condition or any other mental disturbance. Certainly, the Defendant's mental condition is a factor that, with all other relevant factors, may be considered by the jury in determining whether the statements were voluntarily made.

As noted above, the Defendant's own psychiatrist acknowledged that the Defendant's statements were voluntary, and he testified that the statements ought to be considered by the jury. Although the Defendant's statements

may have been "tinged" with the Defendant's psychosis. the Defendant was more in touch with reality than he had been when the crime was committed, and the Defendant appeared to understand the consequences of murder and the consequences of making the many incriminating statements he made to both the employees at K-Mart and to the officers of the Flagstaff Police Department on November 23, 1982.

For all of the foregoing reasons, the STATE submits that all of the many statements made by the Defendant to the police, which were substantially identical to the statements made to the employees of K-Mart before the police arrived, were voluntarily made, did not violate the *Miranda* rule, were spontaneous declarations volunteered by the Defendant and not the product of interrogation. and that the Defendant understood the consequences of making the statements, and that they were therefore voluntarily made.

STATEMENTS MADE AFTER ARREST

Shortly after his arrest at approximately 10:30 a.m. on November 23, 1982 the Defendant expressed his desire to remain silent and requested "rights of an attorney". Later that day, the Defendant had a conversation with his wife Linda Mauro in the presence of Detective Manson. Detective Manson recorded their brief conversation, and the tape was admitted at the Evidentiary Hearing as Exhibit 39.

In addition, Detective Billy Trimble made a taperecording of the brief conversation he had with the Defendant at Captain Latham's office, during which he read Mr.

MAURO his Miranda rights. This tape was admitted at the Evidentiary Hearing as Exhibit 40.

The STATE does not intend to introduce these statements in its case in chief for any purpose. The STATE does intend to introduce them during rebuttal regarding the Defendant's claim of insanity. In this regard, the STATE submits that the statements are highly probative of the Defendant's state of mind at the time they were made and thus, they are admissible on the issue of insanity.

Request for Counsel

Arizona courts have repeatedly held that where the sanity of a defendant is an issue, all relevant conduct of the person's life is admissible into evidence. *State vs. Rodriguez,* 126 Ariz. 28, 612 P.2d 484 (1980); *State vs. Skaggs,* 120 Ariz. 467, 586 P.2d 1279 (1978); *State vs. Sexton,* 4 Ariz. App. 41, 417 P.2d 554 (1966); *State vs. Griffin,* 99 Ariz. 43, 406 P.2d 397 (1965). In *State vs. Griffin,* supra, the Arizona Supreme Court, quoting 2 Wigmore, Evidence § 228, said:

> The first and fundamental rule, then, will be that *any and all conduct* of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for if a specific act does not indicate insanity it may indicate sanity.
>
> . . . where the defendant raises the issue of his sanity, the legal question which the jury must determine is the defendant's responsibility for his conduct at the time the crime was committed. *To resolve this vital issue of criminal responsibility it is necessary that the jury have the entire picture of the defendant.*

99 Ariz. at 48. (emphasis in opinion and emphasis added.)

In this case, the Defendant has noticed reliance upon the defense of insanity. He has noticed Dean L. Gerstenberger, M.D., as a defense witness, who will presumably testify that the Defendant did not know what he was doing when he killed his young son. Defendant MAURO has also noticed numerous lay witnesses who will be called upon to testify as to his behavior shortly after the crime was committed. Part of that behavior includes the Defendant's statements where he, among other things requested "rights of an attorney" after being arrested and given *Miranda* warnings. These statements were made within three hours of the alleged crimes and are relevant to the evaluation of the Defendant's mental capacity and conduct at the time under consideration. In view of the strong position taken by the Arizona courts on the admissibility of "any and all conduct" of a defendant relying on an insanity defense, the STATE submits that admission of the defendant's request for counsel to rebut a defense of insanity is proper under Arizona law. There is ample support for this proposition in other jurisdictions.

The case of *Sulie vs. Duckworth,* 689 F.2d 128 (7th Cir. 1982), is directly on point. Sulie was convicted of first degree murder. His defense was insanity. At the trial, the arresting officer testified that after he gave the defendant the *Miranda* warnings, the defendant asked for an attorney. This evidence was used to show that Sulie was sane when he killed the victim; it was ***not*** used to show guilt. The Supreme Court of Indiana found no error in the admisison of the officer's testimony, and held:

> . . . there was probative value to this testimony as evidence bearing upon defendant's sanity. Evidence of defendant's demeanor at the time of his arrest is relevant to the question of his sanity and is therefore admissible. [cite omitted] *When the defendant has the presence of mind to request an attorney, this is evidence of his sanity and is admissible as such. Sulie vs. State,* 379 N.E.2d 455 (Ind. 1978). at 456-457. (emphasis added.)

The sole issue before the Federal Court of Appeals was whether the defendant's constitutional rights under *Miranda* had been violated. The court held that they had not been violated.

In upholding the admisison of the officer's testimony, the court weighed the slight inhibiting effect on the constitutional right of silence by permitting testimony that a criminal defendant requested counsel, against the value to the state of being able to show that, when interrogated soon after the crime, the defendant, who claimed he was insane at the time of the crime, was sufficiently lucid to ask for a lawyer. The Federal Court determined that the balance strongly favored admissibility.

> . . . especially where the state has the burden of proving sanity beyond a reasonable doubt — a burden some might think virtually impossible to carry in any case of criminal, which implies aberrant, behavior. Evidence of a defendant's lucidity at or near the time of the crime may therefore be important in preventing erroneous acquittals on grounds of insanity, a legitimate and important social goal. That preventive effect must be weighed against the burden, which we have said is indirect, on the exercise of the Fifth Amendment right against compulsory self-incrimination. *Id,* 689 F.2d at 1313.

In *Greenfield vs. State,* 337 So.2d 1021 (Fla. 1976), the defendant appealed his conviction upon the ground that the prosecutor prejudicially commented on the exercise of his right to remain silent. The facts of *Greenfield* showed that shortly after the crime was committed, the defendant was arrested and read his *Miranda* rights. The defendant told the officer that he understood his rights and wanted to talk to an attorney. The defense in that case was insanity. At trial, the court admitted testimony relating to the defendant's request for counsel and the prosecution referred to this request in his argument. In affirming the lower court's judgment, the appellate court said:

> . . . the evidence relied upon by the state was perhaps the most competent evidence on appellant's mental capacity at the time of the offense available, being so closely connected to the res gestae. It was neither unfair to introduce it nor improper to comment upon it in summation. . . 337 So.2d at 1023.

For similar reasons, other jurisdictions have allowed testimony regarding a defendant's request for counsel on the question of insanity. *People vs. Muskgrove,* 358 N.E.2d 336 (Ill. 1976); *United States vs. Trujillo,* 578 F.2d 285 (1978).

In Arizona a defendant is presumed sane. However, if his sanity is put in issue, the STATE can no longer rely on the presumption of sanity. In an insanity case, along with proving every element of the crimes charged beyond a reasonable doubt, the STATE must also carry the heavy burden of proving the defendant's sanity at the time of the crime beyond a reasonable doubt. Certainly, evidence of the conduct and apparent state of mind and awareness

of an accused, particularly where, as here, it is connected closely in point of time to the crime charged, is relevant to the issue of sanity; and it would be manifestly unfair to permit a defendant to establish a defense and then preclude the state from meeting it by barring relevant evidence to the contrary because of the "Miranda" rationale. See, *Greenfield vs. State,* supra. (See, also, *Harris vs. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), where the U.S. Supreme Court held that a statement which was inadmissible against the defendant in the prosecution's case in chief because of *Miranda* violations, was properly usable for impeachment purposes to attack the credibility of the defendant's trial testimony.)

For the foregoing reasons, the STATE submits that it is proper to admit testimony regarding Defendant MAURO's acknowledgment of his Miranda rights at the scene and his request for counsel to Detective Trimble (Exhibit 40) solely in order to rebut his claim of insanity.

Conversation with Linda Mauro

The circumstances which lead up to Defendant MAURO's taped conversation with his wife Linda have been set forth in detail at the beginning of this Memorandum and need not be repeated here. The facts simply are that Defendant MAURO was fully aware of Detective Manson's presence and that his conversation with Linda was being taped. The STATE believes that the admission of this conversation as evidence in its case in chief would in no way violate Defendant's constitutional rights. However, as already stated, the STATE intends to use the taperecording for the limited purpose of rebutting the Defendant's claim of insanity. Based on the cases cited below,

the STATE submits that the conversation is clearly admissible for rebuttal purposes. There is no *Miranda* violation and the anti-marital fact privilege does not apply.

An almost identical situation occurred in *Narten vs. Eyman,* 460 F.2d 184 (9th Circuit, 1969), a case which arose on appeal from the Arizona Supreme Court. There, the 9th Circuit Court of Appeals upheld the admission into evidence of a conversation between the defendant and his wife which was overheard by an officer guarding the defendant. The facts are strikingly similar to the case at bar and are repeated here verbatim:

> An officer guarding appellant testified to certain incriminating statements made by appellant and overheard by the officer during a conversation between appellant and his wife, Mrs. Narten. The conversation took place February 22, 1963, in the sheriff's office at about 2:00 o'clock in the morning. *The meeting was arranged at the request of Mrs. Narten, not at the insistence of the police, and the time was arranged for her convenience since she worked late hours. There was no compulsion or interrogation by the police. There was no evidence of surreptitious eavesdropping; the officer was only present for security reasons, guarding appellant who was charged with a capital offense. Appellant and his wife were fully aware of the officer's presence and proximity;* although he did not interrogate them, at times they each asked questions of him. The officer overheard parts of their conversation when they raised their voices.
>
> In view of these facts, the Arizona Supreme Court, relying on *DeLeon vs. Territory,* 9 Ariz. 161, 168-169, 80 P. 348 (1905), held that the officer's testimony was properly admitted. *The conversation between appellant and his wife was not a privileged communication since they knew a third party (the officer) was present;*

> although the law renders the wife an incompetent witness, the third party could still testify. *State vs. Narten, supra.* We believe this holding to be correct, and find no grounds to disturb it. *Moreover, since the incriminating statements were not deliberately elicited by the police, and were not the result of secret interrogation in the absence of counsel, we find no denial of the right to counsel under the principle of Massiah vs. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) or *Escobedo vs. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). 460 F.2d at 191. (emphasis added).

Last month the Arizona Supreme Court reaffirmed its position on this issue. In *State vs. Summerlin,* (No. 5612, filed November 21, 1983), a capital case, the defendant complained of the admission into evidence of a police officer's testimony as to a conversation between the defendant and his wife. Summerlin had been read his rights and was at the police station when the conversation took place. The meeting was arranged at the Defendant's request. Against the Defendant's wishes, the police remained in the room where the conversation took place.

On appeal, the Defendant claimed that since he had requested a private meeting, the conversation with his wife was privileged. The Court rejected this argument on the basis of *State vs. Narten,* 99 Az. 116, 407 P.2d 81 (1965), affirmed, *Narten vs. Eyman, supra.*

The Court said:

> "Defendant Summerlin was warned by the police officers that he could not meet privately with his wife. Since the officers stood in the same room with Defendant and his wife, Defendant should have known he risked the officers hearing all or part of his conversation." (*St. vs. Summerlin,* No. 5612, pg. 15, slip opinion.)

In the instant case, Linda Mauro is the one who insisted on talking to her husband, over the repeated objections and against the advice of Detective Manson. Upon Detective Sergeant Allen's instructions, Manson advised her that she could not speak to her husband alone, that he had to be present at all times, and that any conversation would be taperecorded. Detective Manson sat no more than three or four feet away from the Defendant with a taperecorder in plain view while the meeting between them took place. As soon as Mrs. Mauro wished to leave, the taped "interview" was terminated. The marital privilege simply does not apply when a third-party is present. *Narten vs. Myen, supra; Narten vs. Myen,* 99 Ariz. 116.

Defendant's *Miranda* argument on this point is equally faulty. His statements were volunteered in response to Linda's remarks. The Detective made no inquiries of his own. Linda was not an agent of the police, she was not instructed as to any questions to ask her husband, nor was she asked to elicit any admissions from her husband concerning the reasons for his arrest. Contrary to Defendant's assertions, this was not the "functional equivalent" of custodial interrogation. The Defendant's claim that his conversation with his wife somehow involved coercion or trickery or deception on the part of Detective Manson is ridiculous and unsupported in the record.

There is extensive case law to further support the admissibility of Exhibit 39.

In *People vs. Holzer,* 102 Cal. Rptr. 11 (App. 1972), the California Court of Appeals upheld the admissibility of a tape recording of the defendant's conversation with

a third party made by the police at a time when the defendant was in custody and had asserted his right to remain silent. In the *Holzer* case, there was the additional factor that the taperecording was done in secret, so that the defendant could not have reasonably known that anything that he said was being recorded. The defendant in that case made similar accusations that he was "tricked" by the police, that the third person to whom he was talking was in effect an agent of the police. The court had little trouble disregarding this argument based upon the record which demonstrated that there was no police interrogation and that Holt, the victim and the third party in question, was not an agent of the police in any way. Holt had agreed that the conversation would be recorded. In this case, Linda Mauro had agreed that the conversation would be recorded. In the MAURO case, unlike *Holt*, there was no clandestine recording. Detective Manson sat a few feet from the Defendant with a tape recorder in plain view.

The taperecording itself was not the issue in the eyes of the California Court:

> "It is immaterial whether the idea of taperecording the conversation originated with Holt or the police. The fact that the conversation was taped only affected the mode of proving its contents." 102 Cal. Rptr. at 14.

Several other cases have dealt with similar situations and have upheld the admissibility of statements by the defendant in custody and a third person such as a relative or the defendant's spouse overheard or recorded by police officers at the jail or police station. *People vs. Petker*, 62 Cal. Rptr. 215 (1967) (police officer overheard statement by defendant to his mother at the jail that he had killed the victim); *State vs. McKercher*, 332 N.W.2d 286

(S.D. 1983) (jailer overheard incriminating statements made by defendant to his wife when seated a few feet away from defendant over the telephone, holding: no reasonable expectation of privacy in a jail); *Parker vs. State,* 372 N.E.2d 1178 (Ind. 1978) (detective overheard incriminating statement by defendant to his wife during jail visit); *State vs. Moscone,* 370 At.2d 1030 (Conn. 1976) (police happened to hear incriminating statement by defendant made to his mother while he was in custody, holding: "private and incriminating statements by the accused may be overheard and used in evidence if they are not compelled at the time they are uttered"); *State vs. Payne,* 639 S.W.2d 597 (Missouri 1982) (police officer overhears incriminating statement made by defendant at police station during phone call to his girlfriend); and *People vs. Case,* 164 Cal. Rptr. 662 (1980) (conversation between defendant and girlfriend during jail visit secretly taped was admissible at trial, holding: no expectation of privacy during incarceration).

Essentially, these cases hold that the presence of officers during visitation between an accused in police custody and a third person, does not constitute an invasion of privacy nor the denial of a right guaranteed by the Constitution.

In any event, the substance of the conversation between MAURO and his wife that that MAURO repeatedly advised his wife not to say anything and that she should get an attorney. This is apparent from the actual tape, which was played at the Evidentiary Hearing on December 1, 1983. The receipt of such testimony at trial will not violate MR. MAURO's own right to remain silent or constitute an improper commentary thereon. A similar situation arose in *United States vs. Warren,* 578 F.2d 1058

(5th Cir. 1978), and in that case the Federal Court of Appeals held that, where the defendant advised his brother and a third person uot to say anything, the testimony did not imply that the defendant himself had chosen to exercise his right to remain silent, but that he was merely admonishing others not to speak, and thus it was manifestly not a comment on the defendant's exercise of his right to remain silent. The Federal Court held therefore that there was no unconstitutional infringement upon the defendant's Fifth Amendment right to remain silent. By analogy the same reasoning applies to this case and the admission of Exhibit 39 in evidence would not constitute improper commentary on MAURO's right to remain silent.

The STATE merely intends to offer this tape as evidence of his mental condition on the date in question. The need for such evidence is all the more compelling in view of the STATE's heavy burden to prove the Defendant's sanity beyond a reasonable doubt.

STATEMENTS MADE TO DETECTIVE MANSON AND DETECTIVE TRIMBLE AT THE COCONINO COUNTY JAIL

At separate times, both Detectives Manson and Trimble had conversations with the Defendant while he was in the jail. These statements will not be offered in the STATE's case in chief. The STATE will only offer them, if at all, for impeachment purposes should the Defendant take the stand. This is entirely proper under the United States Supreme Court decision in *Harris vs. New York, supra.*

The STATE would also point out that the jail meeting between the Defendant and Detective Trimble was initiated by the Defendant. Contrary to Defendant's claim, Trimble did indeed readvise him of his Miranda rights at that time. Under the recent U.S. Supreme Court case of *Edwards vs. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the statements are clearly admissible.

STATEMENT TO JAIL PERSONNEL

Defendant objects to the use of all statements made by him to jail personnel.

Exactly what Defendant hopes to suppress, however, is not clear. He has now been in custody in the Coconino County Jail for over year. During that time, he has, of course, had numerous conversations with jail personnel. These conversations, however, simply cannot be characterized as custodial interrogations within the ambit of *Miranda. Miranda* warnings are not required each time a jailer brings him his dinner, inquires about his health or informs him that he has a visitor.

At any rate, the STATE is aware of only one incriminating conversation the Defendant has had with a jailer and that is the conversation with Cheryl Emery on December 2, 1982, a date shortly after the crime was committed. The STATE will not introduce this statement in its case in chief, but only on rebuttal. On that date, the Defendant made statements to the effect that he was "bad", that he had "committed a sin" and that "they should put him in a box and put him under because he committed a murder." These statements were in no way elicited by Deputy Emery, but were in response to her request that MAURO return his dinner plate.

Regardless of Defendant's status as an inmate, these statements may be introduced into evidence. *Miranda* does not preclude statements given freely and voluntarily without compelling influence. "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without benefit of warnings and counsel, but whether he can be interrogated." *Miranda vs. Arizona,* Supra, 384 U.S. at 478, S.Ct. at 1630. Thus, even if an accused is in custody, any statements he voluntarily offers without interrogation are admissible without *Miranda* warnings being given. *State vs. Brewer,* 26 Ariz. App. 408, 549 P2d 188 (1976).

For example, a police officer could testify about defendant's answers to routine booking questions and give his opinion about defendant's demeanor and sanity, even though defendant had already invoked *Miranda.* The questioning was routine and did not relate to the specific crime the defendant was charged with. *State vs. Garcia* (Kan.) 664 P.2d 1343.

The statements made by the Defendant to Deputy Emery were voluntary, spontaneous declarations and their admission is not precluded by *Miranda.*

Again, however, the STATE would point out that these statements will be offered only to rebut Defendant's claim of insanity and will not be introduced as evidence in its case in chief. The statements are important on rebuttal because they have a definite bearing on the Defendant's state of mind so shortly after the crime was committed.

For all of the foregoing reasons, the STATE requests that Defendant MAURO's Motion to Suppress Statements be denied. The STATE should be permitted to introduce

at trial all statements made by the Defendant prior to his arrest in its case in chief, and all statements which have a bearing on Defendant's mental state in rebuttal, and any statements necessary to impeach the Defendant should he take the stand.

DATED this 14 day of December, 1983.

JOHN VERKAMP
Coconino County Attorney

By: /s/ Michael G. Prost
Deputy County Attorney

By: /s/ Charles D. Adams
Deputy County Attorney

COPY of the foregoing delivered
this 14 day of December, 1983, to:

Frederick M. Aspey
ASPEY, WATKINS & DIESEL
Attorneys at Law
123 North Leroux
P. O. Box 1970
Flagstaff, Arizona 86002
/s/ W.F.

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA IN AND FOR THE
COUNTY OF COCONINO

THE STATE OF ARIZONA,
Plaintiff,

vs.

WILLIAM CARL MAURO,
Defendant.

No. 10056

REPLY IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS

(Filed December 20, 1983)

The Defendant, WILLIAM CARL MAURO, by and through his attorney, undersigned, hereby submits the following Reply in support of his Motion to Suppress Statements which was previously filed with this Court.

This Reply is based upon the entire record before the Court in this matter and the Memorandum of Points and Authorities, attached hereto and made a part heerin, by reference.

RESPECTFULLY SUBMITTED this 20 day of December, 1983.

ASPEY, WATKINS & DIESEL

By: /s/ Frederick M. Aspey
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

On or about November 11, 1983, the Defendant filed a Motion to Suppress various statements which the State indicated in its discovery that it was going to offer at trial. These statements can be conveniently classified as follows:

1. Statements made by the Defendant at K-Mart and while being transported by the Flagstaff Police Department.
2. Statements made by the Defendant at the Flagstaff Police Station.
3. Statements made by the Defendant to Detective Manson and Detective Trimble.
4. Statements made by the Defendant to various jail personnel.

At the Evidentiary Hearing in this matter the State indicated that the State was not going to offer any statements made by the Defendant to Detective Manson and Detective Trimble nor any statements made by the Defendant to various jail personnel in its case in chief. Instead, the State is apparently going to reserve these for rebuttal in the event that evidence of insanity is raised by the Defendant. At the Evidentiary Hearing, defense counsel expressed his belief that we would nevertheless have a voluntariness hearing on these latter statements. The Court agreed but ruled that any evidentiary hearing would be conducted during trial. Therefore, the only statements at issue in this Motion are the statements made by the Defendant at K-Mart and while being transported to the Police Department and statements made by the Defendant at the Flagstaff Police Station.

STATEMENTS AT K-MART AND DURING TRANSPORTATION

As was developed during the Evidentiary Hearing, the Defendant is alleged to have made various statements to investigating officers at K-Mart and during the period of time that he was being transported by the Flagstaff Police Department in a police vehicle. It is the Defendant's position that these statements must be suppressed for two reasons. First, the Defendant was in "custody" or "otherwise deprived of his freedom of action in a significant way" and he should have been advised of his *Miranda* rights. Second, the Defendant was psychotic at the time and his statements were, accordingly, involuntary. The State argues. on the other hand, that any statements made by the Defendant are admissible because the police were merely conducting a general, on-the-scene investigation and that, in any event, the Defendant's statements were "volunteered". While it is true that these are two well-recognized exceptions to the *Miranda* rule, it is, nevertheless, the Defendant's position that the Defendant was in "custody" or "otherwise deprived of his freedom of action in a significant way" and that therefore the *Miranda* rights should have been administered.

In *State v. Mayes,* 110 Ariz. 318. 518 P.2d 568 (1974) the Arizona Supreme Court was faced with an on-the-scene investigation and the issue as to whether or not the defendant should have been advised of his *Miranda* rights. In *Mayes,* supra, the evidence presented at trial established that two uniformed police officers, while in patrol in Tucson, Arizona, noticed a defendant smoking a hand-rolled cigarette. Suspecting that it might be a marijuana cigarette, the officers approached the defendant, but as

they drew close to the defendant, the officers noted that the cigarette appeared to be made of tobacco. The defendant, who had been sitting on the grass, rose as the officers approached. The officers noted that the defendant weaved, was unsteady on his feet and that his eyes appeared glassy. The officers suspected that the defendant was under the influence of some drug or alcohol. The defendant was asked for identification and he fumbled to find and produce his wallet. After some difficulty and several minutes transpiring, he was able to produce some identification. After producing some identification, one of the officers asked the defendant what he was "high on". In response to the question, the defendant produced a bottle containing some tablets and capsules. One of the officers took the bottle, examined it and asked the defendant whether he had a prescription for the contents, to which the defendant replied that he did not. When asked where he had obtained the tablets, the defendant stated, "in Mexico". At no time did either of the officers give the defendant the so called *Miranda* warnings. After the defendant gave the aforementioned incriminating statements, the defendant was arrested, taken to jail and charged with unlawul possession of dangerous drugs. The defendant complained on appeal that he was in "custody" or "otherwise deprived of his freedom of action in a significant way" and that, therefore, he should have been advised of his *Miranda* rights. The Court agreed and reversed the defendant's conviction. Relying on the opinion in *State v. Bainch*, 109 Ariz. 77, 505 P.2d 248 (1973) the Court held as follows:

> "The fact that an officer may be suspicious of an individual is not the test as to whether *Miranda* warnings must be given prior to questioning, nor is

> the mere presence of a police officer to be considered a restrain on the suspect's liberty. The vital point is whether, examining all the circumstances, the defendant was deprived of his freedom of action in any significant manner, and the defendant was aware of such restraint. In the latter instance, the *Miranda* warnings are required to be given before the statements of the defendant may be received in evidence against him." 109 Ariz. at 79, 505 P 2d at 250.

The Court noted that both of the investigating officers agreed that at least from the time of production of the pills that the defendant would not have been permitted to walk away from them. Moreover, one of the officers testified that from the time that identification was asked of the defendant, that he would not have been free to walk away. The defendant testified that from the time that the officers began to question him that he felt he was not free to leave. The Court held that for all intents and purposes the defendant was "in custody" and that therefore the *Miranda* rights should have been given.

In the case at hand, the same situation occurred. Officer Harris testified at the Evidentiary Hearing that he was dispatched to K-Mart because of a report of a hysterical man in the store claiming that he had killed his son. [R.T. 282] He admitted that this was a very serious matter and that he would not take it lightly. [R.T. 282] He stated that he did not speak to the Defendant and that he did not hear Officer Gabilondo advise the Defendant of his *Miranda* rights prior to speaking to him [R.T. 282] He felt that he had a possible "homicide" on his hands. [R.T. 284] After confronting the Defendant at K-Mart, the Defendant was patted down and placed in the back of the officers' patrol car. [R.T. 284] The officer admitted

that Mr. MAURO was not free to leave. [R.T. 284] The Defendant was not advised of his *Miranda* rights until after the suitcase had been discovered in the field adjoining K-Mart. At that time he was advised of his rights by Detective Allen. [R.T 287] At no time did Mr. MAURO waive his *Miranda* rights either orally or in writing. [R.T. 289] The Defendant allegedly told Officer Gabilondo that he had killed his son. [R.T. 311] Officer Gabilondo testified that upon being informed of this that he began to question Mr. MAURO further. He could not recall exactly what questions were asked, however. [R.T. 311-312] He nevertheless admitted, however, that he did interrogate the Defendant At pages 312 through 313 the following questions and answers were given.

Q. Isn't that what you do when you interrogate someone?

A. I interrogate someone?

Q. Yes, when you interrogate a suspect, what do you do?

A. I don't believe I was interrogating him, sir. I was asking what happened.

The Court: That's not the question. The questions is what do you do when you interrogate someone?

The Witness: I beg your pardon.

The Court: The question that was asked is what do you do when you interrogate someone?

The Witness: Ask questions.

Mr. Aspey:

Q. What types of questions?

A. About the act committed, I guess.

Q. In fact that's just exactly what you did in this case, isn't it, officer?

A. You could say that.

Q. What was your answer?

A. You could say that, sir yes.

Q. And yet you did not advise him of his Miranda rights, did you?

A. No, sir, I did not.

Q. And you handcuffed Mr. Mauro, you handcuffed him?

A. Yes, I did.

Thus, it would appear clear that the Defendant was in "custody" or "otherwise deprived of his freedom of action in a significant way" and that he was in fact "interrogated" at the scene by Officer Gabilondo. Yet, he was not advised of his *Miranda* rights until later by Detective Allen. Under *Mayes,* supra, the defendant should have been advised of his *Miranda* rights and his statements at the scene and during transportation in the police vehicle should therefore be suppressed. *State v. Sanders,* 102 Ariz. 565, 435 P.2d 39 (1967). In *Sanders,* supra, the Phoenix Police Department received a call informing them of a possible homicide. Two officers were dispatched at the scene to investigate. Upon arrival, one of the officers knocked on the door of an apartment and the defendant answered. His clothing had blood on it and the officer asked if there was any trouble. The defendant replied that nothing was the matter. At that point, the officer requested permission to enter the apartment and look around. Upon entering the apartment, the officer noted blood stains on the walls, wine bottles strewn around the room and the body of a woman lying at one end of the apartment. Upon viewing the scene, the officer took the

defendant by the arm and led him outside to the patrol car. On the way to the patrol vehicle, the defendant made incriminating statements. At no time was the defendant advised of his *Miranda* rights. The Arizona Supreme Court reversed the conviction and held that the officer's action in placing his hand on the defendant's arm and leading him outside to the patrol car was under the circumstances such an infringement on the defendant's "freedom action" that it required the officer to fully advise the defendant of his constitutional rights under the *Miranda* decision before any further questions could be asked. In the case at hand, a similar result was required.

Other jurisdictions which have considered the issue have reached similar results. Thus, when the facts are established that a suspect has been physically restrained by the police through the use of handcuffs or other force almost all courts have found "custody" which requires the administration of the so called *Miranda* rights. *U.S. v. Averell*, 296 F.Supp. 1004 (E.D.N.Y. 1969); *Roybal v. People*, 496 P.2d 1019 (1972); *Commonwealth v. Moody*, 239 A.2d 409 Cert. denied 393 U.S. 882 (1968); *State v. Paz*, 572 P.2d 1036 (1977); *People v. Connor*, 75 Cal. Rptr. 905 (1969); *People v. McKay*, 287 N.Y.S.2d 795 (1968).

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the United States Supreme Court established the test for determining whether police statements directed to a suspect or made in his presence amount to "interrogation". The Court held that whenever the police should know that their statements are reasonably likely to elicit an incriminating remark from the suspect that such conduct amounts to "interrogation" within the meaning of the *Miranda* decision. In the case at hand, Officer Gabilondo admitted that he "interrogated" the Defendant upon encountering

him at K-Mart. Officer Gabilondo knew that he had a homicide on his hands and that the Defendant was alleged to have killed his son. The Defendant was handcuffed and placed in the back of a locked patrol vehicle. Under the circumstances, it would seem clear that the Defendant should have been advised of his *Miranda* rights. The failure of the officers to administer the rights should therefore require suppression of the Defendant's statements.

The State argues that the facts of this case do not approach that of *Blackburn v. Alabama,* 361 U.S. 199 (1960). The State argues that *Blackburn* does not establish a per se rule for suppression when an individual is psychotic and that *Blackburn* was an extreme example of police coercion and is therefore easily distinguishable on that basis. In *Blackburn,* supra, the United States Supreme Court held that an accused's confession cannot be used against him when "the evidence indisputably establishes the strongest probability that the defendant was insane and incompetent at the time he allegedly confessed." 361 U.S. at 207. Dr. Gerstenberger testified at the Evidentiary Hearing that on a scale wherein zero represents being in touch with reality and three being completely out of touch with reality that Defendant's statements at K-Mart and subsequently at the Flagstaff Police Department ranged from one to two and one-half. Significantly, it was his view that all statements made that day were "tinged with psychosis". He stated as follows:

> Q. Certainly, however, you would agree with me, wouldn't you, doctor, that those statements were a product of his psychotic thinking?

A. I would have to say that anything he said during that day would be tinged with, you know, because of the psychosis, I won't say anything because I remember hearing the statement which I will refer to as a one or a couple of statements on the tapes, but any or almost any statements he made at that time would be influenced by his psychotic thinking.

The State *failed* to present any psychiatric testimony in rebuttal. The State would apparently have the Court uphold the admission of the Defendant's statements on the chance that they were made during a lucid interval. A similar argument was raised in the *Blackburn* case, supra, and rejected. In rejecting the argument, the United States Supreme Court stated:

> "It is, of course, quite true that we are dealing here with probabilities. It is possible, for example, that the defendant confessed during a period of complete mental competence. Moreover, these probabilities are gauged in this instance primarily by the opinion evidence of medical experts. But this case is novel only in the sense that the evidence of insanity here is compelling, for this court has in the past reversed convictions where psychiatric evidence revealed that the person who had confessed was of 'low mentality, if not mentally ill' or had a 'history of emotional instability.' "

The Court went on to weigh the evidence produced at the trial level and reached the conclusion that the "confession most probably was not the product of any meaningful act of volition." *Id.* at 211. The Court reached this result despite the fact that the State introduced evidence through a policeman that at the time of his confession, the Defendant appeared clear eyed, talked sensibly and did

not appear nervous. The State also offered the deposition of a doctor who stated that in his opinion the Defendant's mental condition was normal when the crime was committed and good when the confession was given. Nevertheless, after scrutinizing the entire record and in particular, the testimony of other physicians, the Court concluded that the confession was involuntary and reversed the Defendant's conviction and sentence. In the case at hand, it is the Defendant's position that a similar result is required. It is undisputed that the Defendant has a long history of mental illness. The undisputed evidence is that approximately every two years the Defendant experiences a reoccurence of his illness. The Defendant's wife testified that the Defendant was phychotic on the day in question and Dr. Gerstenberger felt that any statements made by the Defendant that day were "tinged with psychosis". Under the circumstances, it would therefore appear clear that these statements must be suppressed.

STATEMENTS AT THE FLAGSTAFF POLICE STATION

The testimony at the Evidentiary Hearing established that the Defendant was transported to the Flagstaff Police Department where upon he was advised of his *Miranda* rights by Detective Trimble. Upon being advised of his *Miranda* rights, the Defendant told the officers that he wished to remain silent and not speak until he had an attorney. [R.T. 413] Thereafter, the Defendant's wife expressed a desire to speak with him. Prior to allowing the interview, Detective Manson advised the Defendant's

wife of her *Miranda* rights. [R.T. 447] Significantly, Detective Manson did not ask the Defendant for permission to tape record the interview. [R.T. 448] He knew before authorizing the interview, however, that the Defendant was suffering from mental illness. [R.T. 448-449] Going into the interview, Detective Manson knew that the Defendant had invoked his *Miranda* rights. When asked why he tape recorded the interview, Detective Manson testified that he didn't know if the Defendant and his wife were "working together" and he wanted to record any "incriminating statements". [R.T. 452] Under these circumstances, then, it is clear that Detective Manson's presence during the interview together with his subsequent recording of the statements was prompted by more than just a generalized concern for security.

In *State v. Finehout,* 665 P.2d 570 (1983) the Arizona Supreme Court was faced with an appeal by a defendant who claimed that his confession was obtained in violation of the *Miranda* decision. Specifically, the defendant claimed that he attempted to invoke his *Miranda* rights on two separate occasions. The first occurred when the defendant, in response to police accusations that he was lying, stated, "Well, I ain't going to say any more." The second occasion occurred when the defendant stated, "I'm not going to say any more until I talk to an attorney." The Court held that these requests were the functional equivolent of a request for an attorney which triggers the *Miranda* right to be free of interrogation until the person in custody has consulted with an attorney. In the case at hand, the Defendant told the investigating officers that he wished to remain silent until such time as

he had an attorney. His "right to cut off questioning" was not "scrupulously honored". *Michigan v. Mosley,* 423 U.S. 96, 104 (1975). Instead, the investigating officers arranged an interview between the Defendant and his wife and then subsequently tape recorded the interview. They knew at the time that the interview was recorded that the Defendant was suffering from a mental illness and that the Defendant and his wife may have been suspects in the homicide. The Defendant was clearly "in custody" under any definition. One of the express purposes in authorizing the interview was to tape record any incriminating statements. Clearly, the interview amounted to the functional equivolent of interrogation within the meaning of *Rhode Island v. Innis,* 446 U.S. 291 (1980). In *Innis,* supra, the United States Supreme Court defined interrogation as follows:

> "Interrogation refers not only to express questioning, but also to any *words or actions on the part of the police* other than those normally attendant to arrest in custody *that the police should know are reasonably likely to elicit an incriminating response* from the suspect."

Clearly, when Detective Manson obtained permission to conduct the interview from Captain Latham he either knew or reasonably should have known that incriminating responses were likely to be forthcoming. Under the circumstances, the interview with the Defendant should not have been allowed until such time as the Defendant had consulted with an attorney.

Arizona law recognizes that in certain circumstances police deception can require suppression of statements. *State v. Denny,* 27 Ariz.App. 354, 555 P.2d 111 (1976). In *Denny,* supra, the defendant was told by one of the investigating officers that her husband whom she had earlier

shot was still alive. In fact, her husband had died. The Court held that the defendant's statements were the product of admitted police deception and accordingly involuntary. In the case at hand, Detective Manson knew that the Defendant had invoked his *Miranda* rights. He knew that the Defendant was suffering from mental problems. He knew that the Defendant and the Defendant's wife were very likely to make incriminating statements during the interview. He also knew that the Defendant had not waived his *Miranda* rights. By allowing the interview and deceiving the Defendant and his wife as to whether or not an "interrogation" was taking place, the officer "tricked" the Defendant into making statements. This Court should not tolerate such an interrogation technique and it is therefore requested that all statements made at the police station be suppressed.

DATED this 20th day of December, 1983.

ASPEY, WATKINS & DIESL [sic]

By: /s/ Frederick M. Aspey
Attorney for Defendant

Copy of the foregoing delivered
this 20th day of December, 1983, to:

Mr. Michael G. Prost
Mr. Charles D. Adams
Coconino County Attorneys Office
Coconino County Courthouse
Flagstaff, Arizona 86001

/s/ Frederick M. Aspey

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA IN AND FOR
THE COUNTY OF COCONINO

THE STATE OF ARIZONA,
Plaintiff,

vs. No. 10056

WILLIAM CARL MAURO,
Defendant.

---/

In the Matter of the
Contravention of the Search
Warrant in State v. Mauro. No. 38224

---/

Flagstaff, Arizona
November 30, 1983

EVIDENTIARY HEARING

Volume 2

BEFORE: HONORABLE RICHARD K. MANGUM,
Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * *

(p. 324) BYRON LYN ALLEN,

called as a witness herein, having been first duly sworn by the Clerk, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. PROST:

Q. Would you state your name and occupation, please?

(p. 325) A. Byron Lyn Allen, police officer, City of Flagstaff.

Q. What is your rank or title?

A. I'm a Detective Sergeant.

Q. And what are your duties as Detective Sergeant?

A. I supervise the Detective Division, make case assignments.

Q. And how long have you been employed by the Flagstaff Police Department?

A. 18 years.

Q. Did you have any police experience prior to that time?

A. No, sir. Well, one year of police reserve with Flagstaff.

Q. In the course of your 18 years have you had occasion to investigate a number of homicides?

A. Yes, sir.

Q. Did you take part in the investigation of a homicide involving William Carl Mauro on November 23, 1982?

A. Yes, sir.

Q. And at what—what was your role in that investigation?

A. It was sometime after 9:00 a.m. I heard the (p. 326) dispatcher talking to one of the east patrol units,

I'm not sure which officer it was, and stated that the unit, talked to the dispatcher, advised that they were talking to an individual who had claimed to have killed his son and that they were requesting a detective come to the scene, along with a bomb expert, and so I immediately contacted Detective Manson, told him to come with me. Captain Latham, I believe, walked into my office about the time I was walking out to see if we had heard what was going on, and he, I believe he took Lieutenant McCann with him and we all headed out towards K Mart.

Q. And did you arrive out in the vicinity of K Mart shortly after 10:00 o'clock?

A. Yes, it was shortly after 10:00 o'clock, as we arrived.

On the way we ascertained that the units were in the vacant lot area east and just north of K Mart.

Q. And did you have occasion to observe a suitcase located near a pile of wood in the middle of a field?

A. Yes, sir, as soon as we exited the vehicle, we were briefly informed of what had been taking place. We were then shown the suitcase.

It was—there were several logs piled up, stacked up, and we looked under one of the large logs and we could (p. 327) observe a suitcase and we were waiting for Lieutenant McCann to check the suitcase to see if it was a possible bomb.

Q. If you can recall, just tell me everything you knew about the case prior to the opening of that suitcase?

A. I believe it was Sergeant Connell just briefed the Captain and Detective Manson and myself and

Lieutenant McCann, stated that they had responded to a call at K Mart, an individual had stated to some K Mart employees that he had killed the devil and the officers stated that they had been directed to the area of the logs and that the individual had pointed out the suitcase to them, that officers advised that they were afraid to move the suitcase, they were afraid that it possibly could contain a bomb, and the reported suspect was not at the scene. He was in a patrol vehicle with Officer Gabilondo. Officer Gabilondo was attempting to locate the gentleman's residence at that time.

Q. And what was the purpose in doing that?

A. They were trying to locate his residence so they could account for all of his children, to see if all the children were at home or if his wife was at home, if she knew the location of the children, whether or not they were in school, which schools they went to.

(p. 328) Q. So at that point you did not know for a fact whether or not Mr. Mauro had a son?

A. No.

Q. You did not know whether or not, in fact, his son, if he existed, was harmed, alive or dead?

A. No, sir.

Q. At that point did you have probable cause to arrest William Carl Mauro for murder?

A. No, sir.

Q. Did subsequently Lieutenant McCann open the or examine the suitcase in question?

A. Yes, sir, he did.

Q. And what did he find?

A. He, he carefully checked it, as best he could with eyesight prior to removing the suitcase from underneath the log.

Once he had the suitcase totally out from underneath the log, he checked it a little better visually and with his hands to make sure there were no wires and so forth attached.

He then got down on his hands and knees directly in front of the suitcase and un—I don't know if it was left or right latch, but one of the latches he opened.

He then opened the second latch. He then grabbed the top portion of the suitcase and opened it just a crack (p. 329) so he could peek inside to see if maybe there were any detonating wires or anything inside attached to the lid, and he jumped back quickly and stated, there's a body inside.

Q. Did you then examine the suitcase yourself?

A. Yes, sir, Detective Manson and I did.

Q. And what did you find?

A. As Lieutenant McCann jumped back—I'm sorry —the right hand of a child fell out of the suitcase.

Detective Manson and I then raised the lid up completely. I felt if there was a body in that size suitcase it would have to have been cut up, and when we opened it, we found that body was of a young boy and that, and that the body was intact.

Q. Would you describe the position of the body in the suitcase?

A. I guess the best way to explain it would be in the fetal position. It was a rather small suitcase, and the body was all curled up.

Q. At that point did you feel that you had probable cause to arrest William Carl Mauro for murder?

A. Yes, sir.

Q. Did you give, issue any instruction upon discovery of the body to Officer Gabilondo?

(p. 330) A. I don't recall who actually called Officer Gabilondo. It may have been Captain Latham or Lieutenant McCann, Sergeant McConnell, I'm not sure exactly sure who it was, some officer contacted him by radio, advised him to bring Carl Mauro to the scene.

Q. And how soon after that call was placed did Officer Gabilondo arrive with the defendant?

A. I would say within a minute to two minutes.

Q. What action—upon his arrival what action did you take?

A. As soon as Officer Gabilondo parked his car in the immediate vicinity, I approached his patrol vehicle. The suspect was seated in the back seat on the left hand side.

I opened the door, the back door. I put my foot on the running board—it doesn't have a running board, but on the inside of the door, leaned inside so my face was, oh, about a foot and a half from his face. I had removed my Miranda card from my wallet. I advised Mr. Mauro that

he was under arrest for a homicide, and I read his rights to him off the Miranda card.

Q. Did you ask him, inquire whether he understood the rights?

A. I, after the completion of the Miranda, I asked him if he understood his rights. He merely stated, (p. 331) yes.

Q. And then what did you say to him next?

A. I said nothing. I then shut the door and went back over towards the crime scene.

Q. Did you advise him that you would not be interrogating him at that time?

A. No, I did not.

Q. Did Mr. Mauro make any response—well, did Mr. Mauro indicate that he wanted an attorney at that time?

A. No, sir. He merely said, yes, when I asked him if he understood his rights, and that was the end of our conversation.

Q. Did he tell you at that time, Mr. Mauro tell you at that time that he did not wish to make any statements?

A. No, sir.

Q. Okay. Subsequently thereafter did you go to the residence of Linda Ann Mauro, 2912 East Santa Fe, Pinecrest Trailer Park, Space Number 17, in the company of Detective Frank Manson?

A. Yes, sir, I drove the vehicle.

Q. And what was your purpose in going there?

A. Lieutenant, I believe it was Lieutenant McCann and Captain Latham had removed Mr. Mauro from (p. 332) Gabilondo's vehicle, put him in their vehicle for transportation to the Police Department.

I had instructed Corporal Harris to stay at the scene until I could get him some help out there for the photographs and so forth.

Detective Manson and I had just entered my vehicle and we were getting ready to go to the Police Station following Captain Latham with the suspect, and the dispatcher was trying to contact an east unit to go by the residence. She stated that she had a Mrs. Mauro on the telephone. Mrs. Mauro was very upset, was making the statement that her son and her husband had left the house, I believe they said about three hours earlier, and had not returned yet and she was very upset.

Q. Before you go on, has that conversation been—that was tape recorded, wasn't it?

A. I believe it was, yes, sir.

Q. And to your knowledge, the transcript of that dispatch call was, has been retained in evidence in this case?

A. I believe the entire tape is in evidence.

Q. Okay. Proceed. Then what happened next?

A. I believe I informed the dispatcher to disregard on sending a beat unit. I advised her that Detective Manson and I would respond.

(p. 333) We then immediately drove from the K Mart area to the trailer park. It would have taken us a matter of maybe two minutes, just around a couple of blocks.

As soon as we arrived there, we knocked on the door. I don't know if I knocked or if Frank knocked. One of us knocked on the door. The door was answered by Mrs. Mauro. We entered the residence. We—she was very hysterical and upset. We calmed her. She, as I recall, was just babbling.

I think she asked us if we knew where her husband was. We advised her that he was under arrest for homicide and was either at the Police Station or was en route to the Police Station, and we advised her that her son, David, was dead.

Q. Did you ask Mrs. Mauro to accompany you to the Police Station in order to take a statement?

A. A little later we did that, yes, sir. Or maybe Frank asked her that while I was gone. Right immediately—she had, I believe it was three other children in the house, one infant, and I left her trailer to go to the trailer next door to the west and knocked on that door. There was a lady there with her children. I advised her, identified myself to her, advised her that we were working a homicide, that we needed to take Mrs. Mauro down to the Police Station and asked her if she could (p. 334) watch the Mauro children. She agreed. I went over and brought the children back over to the trailer.

Q. What was your purpose in taking, desiring to take a witness statement from Mrs. Mauro?

A. At that point we did not really know what extent Mrs. Mauro would be involved in the homicide. We wanted to get her out of the trailer, get her down to the Police Station so we could interview her and find out her story.

Q. And did you and Detective Manson, in fact, transport her to the Flagstaff Police Station for that purpose?

A. Yes, sir.

Q. Was—when you arrived, was the defendant, William Carl Mauro, already present at the Police Station.

A. Yes, sir, I believe he was being detained in Captain Latham's office.

Q. And who was stationed with him, if you know?

A. I believe Detective Trimble was in the office with him and maybe even Captain Latham.

Q. What was the—why was an officer stationed with the defendant, William Carl Mauro, at the Police Station?

A. It's usually—it's not really department policy, but it's a matter of habit that we normally stay (p. 335) with them, when possible; on any serious crime, we're gonna stay with the defendant, the suspect. We have no actual secure room at the Police Department. All of our cells were removed except for the evidence cells upstairs. All the doors can be locked. However, there are windows in every room and it's not a secure building.

Q. Was there a question in your mind as to the safety of the other individuals about the premises if Mr. Mauro should escape?

A. Yes, sir.

Q. Was escape possible from Captain Latham's office if he were left unattended?

A. Yes, sir, it would be very possible. There is a sliding glass window on the east wall, and most, 90 percent

of the time Captain Latham has that window unlocked and opened for some fresh air.

It would just be a matter of opening the window and kicking out the screen and climbing out.

Q. I'll hand you what have been marked as Exhibits 31 through 34 and ask you to identify the premises depicted in those photographs.

A. This is three shots showing the inside of Captain Latham's office and one photograph showing the secretary's desk and the office door.

Q. Did you subsequently have a conversation (p. 336) with—well, first of all, were you present during the interrogation conducted of Linda Mauro?

A. No, sir, I was not.

Q. Where did you go?

A. I went back to my office in the detectives' office, and Detective Manson utilized Captain Madden's office, which is adjacent to Captain Latham's office.

Q. Did Detective Manson subsequently at a later time, after he had interrogated Mrs. Mauro for a period of time, approach you about her?

A. Yes, sir. After he had finished interrogating hi...

Q. And about what time, if you recall, did he contact you or talk to you?

A. I have a copy of my report.

I don't remember the time. If I could look through it, I might find the time.

Q. I'll hand you the copy, my copy of—

A. I have a copy.

Q. Would you look through a copy of your report?

* * *

(p. 337) DIRECT EXAMINATION RESUMED

By Mr. Prost:

Q. Why did Detective Manson approach you concerning Linda Mauro at the Police Station?

A. He had been in interviewing her. He then came back into the detectives' office—I believe I was sitting in my desk. He approached me and stated that Linda wished to speak to her husband, and Frank told me that he didn't think, he had told her he didn't think it was a very good idea, and I saw no harm in it and suggested to Frank that if she really sincerely wanted to talk to him to go ahead and allow it.

Q. Did you give—was there anyone else present when that conversation took place?

A. I believe Captain Latham was in the office. There could have been other detectives in the office, but I'm not aware of who it would be.

Q. If the—did you give Detective Manson any specific instructions concerning Linda Mauro seeing her (p. 338) husband?

A. I'm not sure if it would be construed as an instruction. I suggested to him that he—well, I guess it would be an instruction. I told him not to leave them alone. I told Frank that I wanted him in the room with the two

of them, and I suggested to him, left it up to his discretion, but I suggested strongly that he even tape the conversation at that point.

Q. Okay. Why did you want Detective Manson in the room?

A. First of all, for Mrs. Mauro's safety, since we had the defendant incarcerated at the time for a crime of homicide. I did not wish to leave his wife in the room with him alone. I still was in the dark somewhat. I didn't know if the two of them were involved together in the crime.

I feared for her safety, first of all, and secondly, maybe they would try to concoct stories and get their stories together and I didn't know if Frank was totally finished talk, talking to her at the time or if he needed to re-interview her; also, the escape factor, if the two of them were in the room by themselves, she may assist him in exiting the window. I took a lot of things into consideration.

Q. Is that fairly standard procedure for the, (p. 339) whenever you have a defendant in custody at the Police Station or a suspect in custody, to always station an officer present with the defendant?

A. We follow that pretty much so, especially if it's a homicide, an armed robbery, you know, a major crime. If it's a burglar we may put him in our interrogation room. My desk is right next to that door and a lot of times the officers will place him in there. They will leave to get paperwork or to get a cup of coffee and I'll crack the door so that I can see in and see the subject, or at least I can hear him, if he starts to push out the screen that's bolted on, I can hear that. Somebody normally is in close proximity so we can either watch or listen for.

Q. Do you take extra precautions when a person has been accused of a violent crime, such as a homicide?

A. Yes, sir.

Q. And in your mind did you have reason to believe that this particular defendant, William Carl Mauro, was dangerous or to be feared?

A. I felt so, yes, sir.

Q. In your opinion did you feel that extra precautions were in order as far as he was concerned?

A. Yes, sir.

Q. Following that interview between, or (p. 340) confrontation, whatever you want to call it, between Linda Mauro and Carl Mauro, did you see the defendant?

A. Yes, sir, I did.

Q. And what was your purpose?

A. We were going to photograph him and remove physical evidence.

I entered Captain Latham's office. Captain Latham was also present and Detective Manson and Detective Blair, who I had instructed to take photographs.

Q. Was that the purpose of your taking Mr. Mauro to the Police Station in the first place?

A. Well, I had placed him under arrest. The next step is to transport him to the Police Station for investigation, whether it be interviews or evidence.

Q. Did you or any member of your department, in fact, interview him at the Police Station that day?

A. I had—I was not present, but Captain Latham and Detective Trimble spoke to him upon their arrival to the Police Station. They had—they did not know that I had advised him of his rights and they had readvised him of his rights.

Q. During the photographic session that took place of Mr. Mauro, could you describe for the Court what was done, how it was done?

A. Detective Blair took photographs of Mr. (p. 341) Mauro. Mr. Mauro was standing next to the closed door of Captain Latham's office.

Q. Well, when he was taking photographs, was it necessary—you were present, right?

A. Yes, sir, I was seated near Captain Latham's desk.

Q. And was it—did Detective Blair have to issue instructions or—to the defendant to assume various poses?

A. Yes, sir.

Q. Did the defendant appear to understand those instructions?

A. Yes, sir.

Q. Did he follow those instructions?

A. Yes, sir, he did.

Q. Did he follow them readily?

A. Yes, sir.

Q. In order to—what type of evidence did you attempt to secure from his body?

A. Besides photographing his body, we then removed his clothing and seized it. We clipped his—Detective Manson clipped his fingernails.

Q. What was the purpose of doing that?

A. So those could later be sent to the Crime Lab for scientific analysis.

(p. 342) Q. Okay. What would you have been looking for?

A. Skin or blood, other foreign objects underneath his fingernails.

Q. Was it necessary to issue instructions to the defendant in order to obtain this evidence?

A. As far as the fingernail clippings, I don't believe we did. Well, to a certain extent, I believe we had him come over, kneel by the coffee table and then Frank would take, took one hand and clipped fingernails off of it, and he just readily, you know, we cut his thumbnail, I believe, first, and then he put out his index finger and then his next finger.

Q. Did he appear to understand those instructions?

A. Yes, sir.

Q. Did he follow them readily?

A. Yes, sir.

Q. At the time that Linda Mauro was allowed to see her husband at the Police Station was she a possible suspect in this crime?

A. Yes, in my mind she still was because we had not thoroughly finished interviewing her yet. I had not had

a chance to set down and talk to Detective Manson and find out exactly what had been told him by her. We had not had time to check out what she had told him, and in my (p. 343) mind, she was still a possible suspect.

Mr. Prost: I have no other questions.

The Court: You may cross examine.

CROSS EXAMINATION

By Mr. Aspey:

Q. Byron, you've been on the force now 18 years?

A. Yes, sir.

Q. I'd like to ask you some questions concerning police interrogation techniques, if I might.

Do you have any experience in police interrogation techniques?

A. Yes, sir.

Q. In fact, isn't it common for detectives to go to school to learn interrogation techniques?

A. Yes, sir.

Q. And isn't it also true that police academies actually teach classes in how to interrogate suspects?

A. I don't know if police academies do. They may, but I have been to interrogation schools.

Q. Now there's all types of interrogation techniques, isn't that true?

A. That's correct.

Q. Could you describe some of the techniques that are utilized?

(p. 344) A. I personally just sit down and start talking to the people myself and then I watch for body language, see if they start sweating and so forth, rubbing the palms of their hands on their pants and so forth, and we don't do this good guy-bad guy routine, we haven't done that for years, just sit down and basically talk to them, try to catch them in lies.

Q. The good guy-bad guy or so-called Mutt and Jeff routine was pretty common in the old days, wasn't it?

A. Back in the old days, yes, sir.

Q. That was prior to the Miranda decision?

A. Yes, sir.

Q. Certainly other techniques are utilized, isn't that true?

A. Yes, sir, I would assume that almost every investigator has his own technique. I imagine there are hundreds of techniques if you get right down to it.

Q. One of them might be confronting the suspect with evidence and then asking him whether or not he had any statements to make?

A. That would be one, yeah.

Q. Another would be confronting a suspect with the fact that perhaps a codefendant in a particular matter has implicated him in the crime?

A. Yes, sir.

(p. 345) Q. And then waiting for his reply?

A. That's correct.

Q. Another technique might be indicating to the defendant or suspect that his cooperation would be taken into consideration in any disposition in the case?

A. That—that is used frequently, but you have to be careful the way that's worded, yes, sir.

Q. If you don't do it right, it's not allowed by the law, is it?

A. That's correct.

Q. Another technique, Byron, would be to, for example, if you are investigating a juvenile matter, to have the parents come down and speak to the juvenile in your presence?

A. That's correct.

Q. Along those same lines, it's not uncommon to ask a family member to come in and speak to someone in your presence?

A. That's correct.

Q. And, in fact, that technique was utilized in this case, isn't it true?

A. I don't believe so, no, sir. That was not our purpose. That was not an interrogation method.

Mr. Mauro had been advised of his rights. He stated he understood them. He stated he wished an (p. 346) attorney, not to me, but to Detective Trimble and Captain Lathem, so he was not going to be asked any questions.

Mrs. Mauro was very shaken. She didn't know what she was going to do. She didn't have money. She needed to talk to her husband, try to find out what he wanted her to do, and so that was the purpose of allowing her to speak to Mr. Mauro, so that she could be self-assured and get any questions answered that she wished.

It's not like we were having her go in and talk to him and when she left we were going to go back in and then try to interview him, because he had already wished an attorney. We could not interrogate him.

Q. I'd like to ask you some questions along that line.

Do you recall at what time the interview between, well, let's not call it an interview, the——let me rephrase it.

Do you recall when the conversation took place between Carl or Bill Mauro, my client, and his wife?

A. I checked my report just before the recess. I thought I had recorded it, but I failed to do so. But it was prior to us seizing the evidence. We started that at 11:25, so it probably would have been very close to 11:00 a.m, roughly in that area.

Q. And according to Billy Trimble's report, at (p. 347) 10:45 he advised Bill of his rights, and Bill told Billy that he didn't wish to speak without having an attorney present, isn't that true?

A. Yes, sir, that's my understanding of it. I wasn't present.

Q. And so the conversation with Linda and Bill took place after he told you or Billy that he didn't want to talk to you?

A. That's correct.

Q. Certainly when you sent an officer in to listen to that conversation—

A. Yes, sir, I did.

Q. You—well, my question is, certainly when you sent an officer in there to listen to that conversation, you knew that it was possible that he might make incriminating statements?

That's correct.

Q. And obviously, you wanted to record that conversation so as to have a record of those incriminating statements?

A. That's correct.

Q. You indicate that you were concerned about escape. Isn't there a room in the Flagstaff Police Department that doesn't have any windows?

A. The dispatcher's quarters, but we sure (p. 348) wouldn't be able to use the dispatcher's quarters.

Sergeant Bailey's office, but it's quite small and it's adjacent to the dispatcher's, and then the sergeants' office in the very back, but again, it's smaller. We utilize Captain Latham's office because it is a bigger office.

Q. Well, the point being here is that there is a secure room where Carl and his wife could have spoken without having to worry about escape through a window?

A. If that's the only factor, yes, but then again, you have radio traffic, telephones ringing, and so that's why we normally don't utilize the sergeants' office. You have officers coming in and out, sergeants and lieutenants coming in and out of that office. Those were more practical rooms at the time to utilize.

Q. Was Linda Mauro a suspect in a homicide at the time that she spoke to Bill Mauro?

A. In my mind, she was still a suspect because we did not have her full story. We did not have, naturally, time to investigate very few of the details at this point because you are looking at maybe an hour, hour and a half at the latest after we had responded to K Mart.

Q. She had spoken, though, to Detective Manson prior to this conversation?

A. That's correct.

(p. 349) Q. And he had her story at that time, didn't he?

A. I'm sure he just had highlights. He later sat down and interviewed her again in more detail and taped, I believe he taped that conversation, and the first time he had talked to her, he didn't even ask her her complete name, date of birth, you know, that type information. He didn't do that until the second conversation.

Q. Was she free to leave the Police Station?

A. If she had got up and tried to walk out of the office, I'm sure, or out of the building, I'm sure we would have detained her.

The thought never really crossed my mind until you asked that question, since it never happened, but at that point she have as much of a suspect in my mind as Mr. Mauro was. I don't think she could have just freely walked out the door.

Q. Well, Officer Gabilondo—

A. She had not been placed under arrest.

Q. Officer Gabilondo has told us that Bill Mauro was not free to leave——excuse me—Officer Gabilondo has told us that Bill Mauro was free to leave at the K Mart, and yet his wife, apparently, was not free to leave, is that what you're saying?

Mr. Prost: Your Honor, that's argumentative.

(p. 350) The Court: Sustained.

Mr. Prost: I will object.

Mr. Aspey:

Q. Did my client in your presence ever waive his Miranda rights, either orally or in writing?

A. No, sir.

Q. At the time that the conversation took place between my client and his wife, you were aware, were you not, that his mental health was at issue?

A. No, sir.

Q. You hadn't been told that he had been making some bizarre statements about killing the devil and this type of thing?

A. I was aware that, like I initially said, I heard it over the air, the initial conversation that officers were at K Mart, they had a gentleman who had stated that he had killed the devil, but after we had gone to the scene, done everything there, placed him under arrest, he was transported to the Police Station, we went and talked to Mrs. Mauro, then we got down to the station, it totally was not in my mind about his mental capabilities at the time.

Q. Well, hadn't Mrs. Mauro told you about the fact that in the day or so prior to the homicide that her husband had been seeing spacemen and—

(p. 351) A. I was unaware of that. Like I say, I had not yet, at the time that conversation took place, I had not yet had a chance to really talk to Detective Manson, and I had not talked personally with Mrs. Mauro except briefly at the trailer to let her know about her son's death and the arrest of her husband.

Q. So Frank Manson would have been privy to that type of information?

A. Yes, sir.

Q. And that was not apparently relayed to you?

A. No, sir, not at that time.

Mr. Aspey: I don't have any other questions.

The Court: Redirect.

Mr. Prost: A few more, Your Honor.

REDIRECT EXAMINATION

By Mr. Prost:

Q. Sergeant Allen, the request——to your knowledge, the request that Linda Mauro be permitted to see her husband at the Police Station came from her, is that correct?

A. According to Detective Manson, yes, sir, when he approached me, that's the indication I got from him.

(p. 352) Q. This idea did not come from you?

A. No, sir.

Q. It did not come from—this is not in your opinion some ploy or interrogation technique from Detective Manson?

A. No, sir. In fact, Detective Manson, when he first came to me to advise me that she wished to talk to him, he made the statement that he had tried to talk her out of it, and that she was insistent on talking to her husband, and I said, well, I see no problem with it as long as he was in the presence of both of them.

Q. All right. Even if you had had a room with no windows, totally secure, would you have felt compelled to station an officer near Mr. Mauro for Linda Mauro's protection?

A. Yes, sir, if we had it to do all over again, I don't feel that I would allow the woman in the same room with him without an officer present.

Q. Is that because you knew at that point or suspected that he had killed his own son?

A. That's correct.

Q. And did you feel there was a possibility he might, in fact, try to kill another family member?

A. The thought crossed my mind.

Q. After Mr. Mauro had stated he wished to make (p. 353) no statement to the Police Department, to your knowledge there was no interrogation conducted of him at all?

A. That's correct.

Q. That is standard department policy, is that correct?

A. Yes, that's correct.

Q. And that is also your understanding of the law, is that correct?

A. That's correct, sir.

Q. Is it the department's policy to, whenever a defendant invokes his right to remain silent, requests an attorney, to scrupulously observe that?

A. That's correct.

Q. If that is not observed, do you run the risk of impairing or tainting, ruining the investigation of a case?

A. Yes, sir.

Q. You as a police officer enforce the law, and you do not train your officers—I'm just going to ask you as a supervisor of detectives—would you tolerate a detective

who used some ploy to violate the law, of the rights of the defendants?

A. No, sir.

Q. Do you feel that is as much a part of your job as the investigation of cases in order to make cases (p. 354) against criminal defendants?

A. Yes, sir, for sure.

Mr. Prost: I have no other questions.

The Court: You may step down.

* * *

IN THE SUPERIOR COURT OF
THE STATE of ARIZONA

IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA,)

Plaintiff,)

vs.) No. 10056

WILLIAM CARL MAURO,)

Defendant.)

Flagstaff, Arizona
December 1, 1983

EVIDENTIARY HEARING

Volume 3

BEFORE: HONORABLE RICHARD K. MANGUM,
Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * *

(p. 389) GARY LATHAM,

called as a witness herein, having been first duly sworn by the Clerk, took the stand and testified as follow [sic]

DIRECT EXAMINATION

By Mr. Prost:

Q. Would you state your name and occupation, please?

A. Gary Latham, police officer.

Q. And what is your rank or title?

A. Captain, support service, division comm

Q. How long have you been with the Flagstaff Police Department as a law enforcement officer?

A. 19 years.

Q. Were you with any other department prior to that time?

(p. 390) A. I was with NAU Police Department as a student officer.

Q. During those 19 years of experience, were you involved in the investigation of criminal cases?

A. Yes, sir.

Q. Did you come into contact with the defendant, William Carl Mauro, on November 23rd, 1982?

A. Yes, I did.

Q. Do you recognize him in the courtroom today?

A. Yes.

Q. Could you identify him for the record?

A. Sitting to the right of Mr. Aspey.

Q. The gentleman in the plaid shirt with the dark hair?

A. That's correct.

Mr. Prost: Your Honor, may the record reflect he's identified the defendant?

The Court: He has.

Mr. Prost:

Q. What was the nature are of your initial contact with the defendant on November 23rd, 1982?

A. It's when I transported him to the Police Department after he had been arrested at K Mart.

Q. What was your purpose in transporting him to the Police Department?

(p. 391) A. To effect the arrest and take him into custody and hold him until the investigating detective arrived.

Q. And who was the investigating detective at that time?

A. Be Frank Manson.

Q. And who would have made that assignment?

A. Sergeant Allen, Detective Division supervisor.

Q. Does Sergeant Allen supervise all of the detectives?

A. Yes, he does, with the exception of one.

Q. And do you—do you supervise Sergeant Allen?

A. Yes.

Q. Do you recall the defendant's demeanor during that ride back to the Police Station?

A. Yes, I do.

Q. Can you describe that for the Court?

A. He was calm and quiet. He made no statements while he was in the police car that I recall.

Q. Did you attempt to interrogate him?

A. No, I didn't.

Q. Why?

A. Pardon me?

(p. 392) Q. Did you attempt to interrogate him?

A. No, sir, I didn't.

Q. Would you be able to compare your recollection of Mr. Mauro on November 23rd—well, first of all, have you observed the defendant as he appears in the courtroom today?

A. Yes, I have.

Q. Can you compare the way he looks now to the way you recall him on November 23rd, 1982?

A. I'd say very similar, if not the same.

Q. Upon your arrival at the Police Station, what did you do?

A. He was taken to my office. At that time Detective Trimble came to the office and he was again advised of his Miranda rights.

Q. And did that take place in your presence?

A. Yes.

Q. Let me back up a little bit.

Was Lieutenant McCann also in your patrol vehicle, not patrol vehicle, in your vehicle with you when you transported the defendant back to the Police Station?

A. Yes, he was.

Q. Did you order or direct the defendant into your vehicle at the field behind K Mart or did some other officer do that?

(p. 393) A. I don't recall. I think it was another officer.

Q. Did the defendant have to be helped into the car?

A. No.

Q. Did he appear to understand what he was supposed to do?

A. Yes.

Q. Did he appear to understand what he was told to do?

A. Yes, he did.

Q. And upon your arrival at the Police Station, did you have to help him out of the car into the Police Station?

A. I think I walked with him from the car to the Police Station due to the fact he was handcuffed behind his back, which is our procedure.

Q. Did you give him any instructions about which way to go, which way to turn and so forth?

A. I pointed toward the door.

Q. And did he understand that instruction?

A. Yes, there was no problem there.

Q. Did he commence to walk in the direction that you had pointed?

A. Yes.

(p. 394) Q. Was he able to follow your directions?

A. Yes, he was.

Q. Did you also direct him to your office?

A. Yes.

Q. Did he appear to follow those—was he able to follow those directions without any trouble?

A. Yes.

Q. Did you or some other officer in your presence direct the defendant to have a seat in your office?

A. He had a seat, and I don't recall who directed him to do that, but that was—he was told to have a seat, and he did.

Q. Did he appear to understand that direction without any trouble?

A. Yes?

A. Yes, he did.

Q. After your arrival at the Police Station—first of all, I want to hand you some photographs and ask you to identify them for the record, and I don't believe you took these photographs, but it would be Exhibits 31, 32, 33 and 34.

If you could take a look at those...

A. The first one shows the door, entry door to my office.

(p. 395) Q. Well, the first one being 31?

A. I'm sorry, Number 34 shows the door to my office and my secretary sitting at her desk in front of the office.

Q. Okay. Do the other three photographs, 31, 32 and 33, show various aspects of the interior of your office at the Police Station?

A. Yes, sir.

Q. Do those photographs fairly and accurately represent or depict the interior of your office as it was on November 23rd, 1982?

A. Yes.

Q. Does your office—is your office designed or capable—is your office a secure facility for retention of a prisoner?

A. No, it's not.

Q. Is there a window in the back of your office?

A. Yes, sir.

Q. Could a prisoner escape through that window?

A. I believe it could be done, yes.

Q. I mean there's no bars on that window, is that correct?

A. No, it's merely a sliding window with a screen and it's about four feet off the ground.

Q. Is it your policy that when a defendant is— (p. 396) first is being held in custody charged with a violent crime at the Flagstaff Police Department to have an officer guarding him or stationed next to him for security purposes at all times?

A. Yes.

Q. Could you explain to, although I think it's obvious, but could you explain to Judge Mangum your reasons for that policy?

A. Well, the reasons for the policy is if a person is arrested for a violent crime, if he escapes, he could be a danger to other persons and himself or the citizenry at large. The purpose of the custody is to restrain this violent behavior, so if he was left alone, obviously, he could escape and commit other acts.

Q. Did you direct that an officer be stationed to guard Mr. Mauro on November 23rd, 1982, while he was at the Police Station at all times?

A. I don't think I made that direction. I think it was assumed and done without any direction.

Q. And that's pursuant to your practice?

A. Yes.

Q. All right. Now I understand that for a few minutes after your arrival Lieutenant McCann was stationed with the prisoner, and then following that were you present in your office with the defendant while Lieutenant (p. 397) McCann was there, or do you recall?

A. I recall that Lieutenant McCann and I came in the office with him, and I believe Lieutenant McCann left and then Detective Trimble came in.

Q. Were you present during the reading of the Miranda rights to Mr. Mauro?

A. Yes, I was.

Q. Did you—and who actually did that?

A. Detective Trimble read him his rights.

Q. And was that conversation tape recorded?

A. Yes, sir.

Q. What was the defendant's demeanor while he was in your office, and in particular, while he was being read his Miranda rights by officer Trimble?

A. He was attentive. He was calm. He appeared to be, to understand what was being said to him.

One time before his rights were read, I told him what he was under arrest for, and I believe I asked him if he understood that. He said yes, and that's the extent of the conversation I had with him at that time, but he appeared to be in full control of his mental and physical faculties.

Q. Could you compare his demeanor while he was in your office while you observed him to his demeanor as you observe him in the courtroom today?

(p. 398) A. Without hearing him speak, I would say it would be the same, his physical appearance and general demeanor.

Q. Now following the reading of the Miranda rights by Detective Trimble, did you or Detective Trimble attempt to interrogate Mr. Mauro?

A. No, other than to ask him his name. He was—he was asked his name.

Q. Why didn't you attempt any further interrogation?

A. He indicated he wanted an attorney.

Q. And what is the policy and procedure of the Flagstaff Police Department when any defendant or suspect has asked for an attorney or indicated his desire to remain silent?

A. Well, no further interrogation is attempted other than to obtain basic information on the suspect's name, address and that type of information, no interrogation is permitted regarding the crime that he is accused of or suspected of.

Q. Subsequent to this interchange concerning Miranda rights between Trimble and Mr. Mauro, did you about an hour later, or were you present about an hour later with Detective Sergeant Allen in the detectives' office room?

(p. 399) A. I don't recall the time, but at a time period after that, I was in the detectives—

Q. Were you present when Detective Frank Manson entered the room?

A. Yes.

Q. And did you overhear a conversation between Detective Manson and Sergeant Allen concerning Linda Mauro?

A. Yes, I did.

Q. Could you relate to the Court as best you can recall, what that conversation was?

A. I indicated, or Detective Manson indicated that Mrs. Mauro wanted to see her husband and talk to him, and

Sergeant Allen approved this, and I believe at this time he told Detective Manson to take a tape recorder with him when he attended, to be with them and have a tape recorder of the conversation.

Q. What was the purpose in having Detective Manson present while Linda Mauro saw her husband in your office?

A. Well, I think there were several reasons, primarily.

Mr. Aspey: Excuse me, Your Honor, objection.

May I voir dire the witness on this?

The Court: Go ahead.

(p. 400) Mr. Aspey:

Q. Did you make the decision to send Frank Manson in to be present during the conversation between Carl Mauro and his wife?

A. No, I didn't.

Q. Who made that decision?

A. Sergeant Allen.

Mr. Aspey: Okay. I would object then, Your Honor, it calls for speculation. Obviously, he didn't make the decision.

The Court: Overruled.

Mr. Prost: I'll ask the question again.

DIRECT EXAMINATION RESUMED

By Mr. Prost:

Q. If you know, what was the purpose in having Detective Manson present during any interview or confrontation, conversation, viewing, whatever you want to call it, between the defendant, Mr. Mauro, and his wife, Linda?

A. Well, one of the reasons would be to, for her protection, in case he attacked her or there was any violence that occurred. Some officer would have to be present. It was Detective Manson's case, so he would be the obvious one to be present.

(p. 401) The other reason would be to see what the conversation was about. She and he both were under investigation at that time, and any statements that she made or he made could shed light on our case.

Q. Let me go back to the reading of the Miranda rights by Trimble, which was a period of time prior to this. Were each—did he appear to understand what was happening at that point?

A. Yes.

Q. Did he appear to understand what was being said to him?

A. Yes, he did.

Q. Did he have any difficulty that you recall in communicating with Detective Trimble in response to the reading of those rights?

A. No, he didn't.

Q. Were the answers that he gave appropriate to the questions that Detective Trimble asked him in regard to his rights?

A. Well, I don't recall every specific answer, but after his rights were read or possibly during the time they were being read is when he requested the presence of an attorney, and that would indicate to me that he understood his rights.

Q. Was he specifically advised, if you recall, (p. 402) that any statement he did make could or would be used against him?

A. Yes, his rights were read off of a form.

Mr. Prost: I have no other questions.

The Court: Cross examine?

Mr. Aspey: Yes.

CROSS EXAMINATION

By Mr. Aspey:

Q. Captain Latham, do you recall at what specific time the Miranda rights were administered?

A. No, I don't. They were administered shortly, for the second time, they were administered shortly after he came in my office. I believe the first time was in the K Mart or the field directly behind K Mart in a patrol car.

Q. As I understand your testimony, Detective Billy Trimble administered those rights in your presence?

A. Yes.

Q. And is it your testimony that my client told you he did not wish to speak with you until an attorney had been appointed to represent him?

A. I believe his words were that he wanted an attorney.

Q. Well, in your report you say, Mauro indicated (p. 403) he understood these and then stated he did not wish to speak to us without an attorney?

A. That would be correct then.

Q. So it was more than just a request for an attorney, he specifically told you he did not wish to speak to you without an attorney?

A. Yes.

Q. We've had some testimony that Bill Mauro was barefoot. Was he barefoot at the time that you observed him?

The Court: Where?

Mr. Aspey:

Q. At the Police Station, excuse me?

A. I don't recall.

Q. Did he appear to have been involved in a scuffle?

A. Could you expand upon that a little bit?

Q. Well, we've had some testimony that his shirt was dirty and he appeared to have been involved in a scuffle. My question is, when you observed him at the Police Station did he appear to have been involved in a scuffle?

A. I don't think so.

Q. Did he appear to be in a state somewhere between euphoria and crying?

(p. 404) A. No.

Q. Or hysterical?

A. (No response indicated.)

Q. Did he appear to be babbling?

A. No.

Q. Did he have a jacket on?

A. I don't think so.

Q Was he salivating from the mouth?

A. No, he wasn't.

Q. Was he perspiring?

A. I don't recall.

Q. Captain Latham, is there a secure office in your Police Station without windows where suspects can be placed?

A. No, there isn't.

Q. Nowhere in the Police Station?

A. Nowhere in the Police Station.

Q. So when you take a suspect into your Police Station, you always have that suspect guarded by someone, is that correct?

A. Yes, if it's a felony suspect and there is a chance of violence, that's correct

Q. Certainly it would have been possible to allow Mrs. Mauro to speak to her husband at the county jail

and utilize the phone system in the interview rooms, (p. 405) wouldn't it?

A. Sure.

Q. That would have been a secure situation, would't it?

A. Yes.

Q. And it wouldn't have been necessary to overhear the conversation in that situation, would it?

A. Wouldn't have been necessary?

Q. Right?

A. No, it would't have been.

Mr Aspey: That's all the questions I have.

The Court: Redirect?

Mr. Prost: Yes.

REDIRECT EXAMINATION

By Mr. Prost:

Q. Was one of your purposes in taking Mr. Mauro to the jail to take photographs and obtain evidence from his body?

A. I think that was done in the office, photographs.

Q. And when the—do you recall when the interchange or confrontation between Linda Mauro and Mr. Mauro took place, whether that had been done yet or not, do you know?

(p. 406) A. He was photographed before she saw him, to the best of my memory.

Q. Was he being held there for obtaining other evidence from his body or do you know?

A. I think we were about finished with him at the time she talked to him.

Q. I see. Captain Latham, even if there had been a secure area in the Police Station, would you have permitted this woman to see her husband, who had been charged with murder of their seven year old son, alone without the presence of an officer for her protection?

A. Absolutely not.

Mr. Prost: He [sic] have no other questions.

Mr. Aspey: Your Honor, may I reopen on that last issue?

The Court: Yes.

RECROSS EXAMINATION

By Mr. Aspey:

Q. You are familiar with our county jail here in Flagstaff, are you not?

A. Yes, I am.

Q. Isn't it true that there is a visitation section?

A. To my knowledge there is, yes, sir.

(p. 407) Q. And isn't it true that there is a glass wall which separates a prisoner from a visitor?

A. Yes, there is.

Q. Isn't it true that there is a phone system utilized so that the visitor can speak to the prisoner?

A. That's my understanding, yes, sir.

Q. Had that system been utilized in this case, certainly there would not have been a concern for Mrs. Mauro's safety, would there?

A. No, there wouldn't.

Mr. Aspey: That's all the questions I have.

The Court: Anything else?

Mr. Prost: I have no other questions, Your Honor.

The Court: You're excused. You may leave.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA,

Plaintiff,

vs. NO. 10056

WILLIAM CARL MAURO,

Defendant.

Flagstaff, Arizona

December 1, 1983

EVIDENTIARY HEARING

Volume 3

BEFORE: HONORABLE RICHARD K. MANGUM,
Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * *

(p. 421) FRANK MANSON,

having been previously sworn by the Clerk, retakes the stand and testifies further as follows:

DIRECT EXAMINATION

By Mr. Prost:

Q. Would you state your name and occupation, please?

A. Frank Manson, police officer for the Police Department, City of Flagstaff.

Q. And what is your rank or title?

A. Detective.

Q. How long have you been employed by the Flagstaff Police Department?

A. Since 1979.

Q. Have you had any prior law enforcement experience?

A. Yes.

Q. And where was that?

A. The Coconino County Sheriff's Department from 1974.

Q. During the course of your law enforcement experience have you had training in the investigation of criminal cases, including homocides?

(p. 422) A. Yes, sir.

Q. Has it been part of your duties throughout that time to investigate criminal cases?

A. Yes.

Q. When were you assigned to investigate the case of William Carl Mauro?

A. The 23rd of November, 1982.

Q. And who made that assignment?

A. Detective Sergeant Allen.

Q. And Sergeant Allen supervises and coordinates the activities of all the detectives in the department?

A. Yes, he does.

Q. Did you accompany Sergeant Allen on that date to the residence of Linda Ann Mauro?

A. Yes, I did.

Q. And did you ask her to come to the Police Station for the purpose of taking her statement?

A. Yes.

Q. And what was your reason for doing so?

A. We needed to find out what was going on with the death of the boy.

Q. Can you describe Mrs. Mauro's demeanor when —well, first of all, when you arrived at the residence, did you or Sergeant Allen tell her the status of her son, David?

(p. 423) A. Yes, we did.

Q. What exactly did you tell her?

A. We told her that regretfully we had to inform her that her son had, was dead.

Q. Did you also inform her that her husband was under arrest for homocide and in custody at the Flagstaff Police Station?

A. We told her that her husband was being held in connection with the death of the boy.

Q. What was her demeanor or reaction when you gave her the sad news, if you can recall?

A. She was weeping. She was excited. She was like she had been slapped in the face when we told her that the boy was dead.

Q. Was anyone else present when you interviewed her at the—excuse me, Your Honor.

Was anyone else present when you interviewed Mrs. Mauro at the Police Station?

A. No.

Q. What was the first thing you did before—well, first of all, prior to the interview did you read Mrs. Mauro her Miranda rights?

A. It was just into the interview that I decided that I had better advise her of her rights.

Q. And why did you do so?

(p. 424) A. I didn't know what her relationship was to the murder of the little boy.

Q. By that do you mean that she was a possible suspect in the crime?

A. Yes, she was.

Q. How long did this initial interview last?

A. I was with her for approximately a little over a half hour.

Q. Can you tell the Court about what time this interview, initial interview took place?

A. Immediately upon our arrival at the Police Department.

Q. Can you give us—

A. A little after 10:00, somewhere in there.

Q. When did Mrs. Mauro become aware that her husband was in custody at the Police Station?

A. I'm not sure. It was probably during our initial interview. I know that we had closed the door to the captain's office and that we entered through the back door. We didn't want them to see each other.

Q. What was her emotional state during the course of the interview you had with her?

A. In the beginning of the interview, she was weeping. She was extremely upset.

Q. At the conclusion of that interview or near (p. 425) the end of it or during the course of it, did Mrs. Mauro ask you if she could see her husband?

A. Yes, she did.

Q. Do you recall the words in which she did so?

A. She said, I want to talk to Carl, and I said, I don't know why, why make it worse, you've already learned that your son's dead. You don't have to have anything to do with him if you don't want to.

She says, no, I want to talk to Carl, and I said, I don't think it's a good idea, you know, why go through the emotional trauma. It's bad enough. Let's just leave it alone.

She says, no, I want to talk to him, and it was at that point that I said, well, if it's okay with my supervisor, we'll go ahead and do it, so I contacted Sergeant Allen.

Q. And then what did Sergeant Allen—did Sergeant Allen approve this request?

A. Yes, he did.

Q. Did he give you any specific instructions or directions concerning who was to be present during the interview?

A. He said that if they are gonna be in there together, you're gonna be with them.

Q. And what was your understanding of the reason (p. 426) for that?

A. It was my understanding that this man had most likely already killed somebody, he had nothing to lose by harming anybody else. He had every reason in the world to want to get away.

Q. Could he have gotten away from the place where he was located?

A. Oh, certainly.

Q. Had you finished—why was Mr. Mauro being held at the Police Station during this period of time in the first place, what was your purpose or the police department's purpose?

A. When I had gotten to the station, I had learned that he was there. I hadn't been told of exactly where he had been located, and the purpose would be to get a statement from Mr. Mauro, you know, get his side of the story, if at all possible, and collect evidence, if there is any physical evidence to be obtained.

Q. What about photographs?

A. That would be part of the physical evidence.

Q. Were you present during the time when the physical evidence and photographs were taken of the defendant

at the Police Station and when physical evidence was taken from him?

A. Yes.

(p. 427) Q. And, in fact, were the photographs taken—you were the one that asked that photographs be taken?

A. No. I believe Sergeant Allen had already contacted Detective Blair and told him that he'd handle the photographs, since I still had Mrs. Mauro at the station.

Q. All right. When were the photographs and evidence taken from Mr. Mauro in relationship to the, for lack of a better word, interchange between Mrs. Mauro and her husband?

A. Afterwards.

Q. When you went to see Sergeant Allen about this —well, why did you go to Sergeant Allen in the first place, to get his approval for Mrs. Mauro to see her husband?

A. Well, I just thought that she wasn't gonna accept my answer that I didn't think it was necessary to see him and that I had more or less passed the buck. I said, okay, if Sergeant Allen will say it's okay, it's all right with me. That's basically the reason.

Q. Well—

A. I was going to let him say no, basically, or yes, and just let him make that decision.

Q. Well, why didn't you think it was a good idea for Mrs. Mauro to see her husband at that time?

(p. 428) A. I thought she was upset enough as it was.

Q. Did you have in mind other experiences where relatives of victims who were then dead, relatives wished to see those victims?

A. Yes. In fact, I've had victims or family members want to see suspects and family members and it's been my unpleasant experience where they have just beaten the hell out of each other and I was caught in the middle of that.

Q. Have you had occasion to have discussions with relatives of victims who were killed in car crash, train wreck, other type of accidential injury?

A. Quite frequently.

Q. Did you have in mind that experience when you discouraged Mrs. Mauro from seeing her husband, Carl?

A. Yes.

It had always been my philosophy that it's always a lot better to not look at the dead body of a loved one or someone involved in that because it's easier to remember them the way they were before that.

Once you see them in their final state, whether it's a dead body or a spouse or something, they are going to remember that instead of the more pleasant things.

Q. Near the conclusion of this first interview with Mrs. Mauro, did you—well, did you feel sorry for (p. 429) her?

A. Yes, I did.

Q. Were you concerned about her emotional well being?

A. Yes, I was.

Q. Did you—was it your opinion or were you beginning to get the idea at that time that she was also a victim. along with David Mauro?

A. That possibility had come up.

Q. Prior to—prior to allowing Mrs. Mauro to see Mr. Mauro, did you advise Mrs. Mauro that you would have to be present during, when she saw her husband?

A. Yes, I did.

Q. Did you also advise her that you were going to have a tape recorder present?

A. That's correct.

Q. Did you also—did you ask her or tell her any questions or any things to ask?

A. No, I did not.

Q. Did Detective Sergeant Allen tell you to tell her to ask any particular thing?

A. No.

Q. Did you ask her to ask Mr. Mauro any questions whatsoever?

A. None at all.

(p. 430) Q. About the crime he was charged with?

A. No. She—in no way did I ask her to be an agent for the Police Department.

Q. What time did you—what was the approximate time and location where the interchange between Mrs. Mauro and Mr. Mauro took place at the Police Station?

A. It was right around 11:00 in the morning.

Q. Who was with Mr. Mauro—did it take place in Captain Latham's office?

A. Yes, it did.

Q. Was anyone with Mr. Mauro when you and Linda Mauro walked in?

A. We were changing, I think Trimble was walking out and we walked in.

Q. Was the door to Captain Latham's office left open at all times during this particular interchange between Mr. and Mrs. Mauro?

A. Yes, it was left open just one or two inches.

That's so she could get out in a hurry if she had to.

Q. I'll hand you what have been marked as Exhibits 31, 32, 33 and 34, and ask you to identify what is depicted in those photographs?

A. This is the interior of—

Q. Now let's take the photographs one by one.

(p. 431) A. Oh, all right.

Q. And I want you to hold them up for Judge Mangum to see and show what they illustrate.

A. Item 34 is the exterior to the captain's office, and the door is ajar a few inches as the secretary is sitting outside at her typewriter.

31 is a view of the bookcases and where I was sitting and the approximate location where Mauro was sitting.

Q. Okay. Can you identify for the judge who is supposed to be Mr. Mauro and who is—

A. In 31 it's Lance Roberts, is sitting in the place where Mauro sat.

Q. Okay. Now Judge Mangum may not know who Lance Roberts is.

The Court: Does it matter?

The Witness: He's a patrolman.

Mr. Prost:

Q. If you could just point him out in the picture where—

A. He's on the right side of the picture.

Item 33 is Detective Sergeant Allen with his back to the photographer in the location where Mauro sat and the relationship of the two chairs where I sat and the defendant sat, and in Item 32, it's a different view of (p. 432) Roberts and myself, him sitting in the position where Mauro sat and I'm sitting in the position that I sat while Mr. and Mrs. Mauro spoke to each other.

Q. Does Exhibit 33 also show the window at the rear of Captain Latham's office?

A. Yes, it does.

Q. Was Mrs. Mauro seated at any time during this interchange?

A. I don't believe she was. She was standing and walking.

Q. Mr. Mauro was seated?

A. Yes, he was.

Q. And you were also seated?

A. Yes.

Q. You had a tape recorder?

A. Yes, I did.

Q. Was that tape recorded in plain view?

A. Yes. In fact, I, before I went in, I told Mrs. Mauro that I'm gonna have to be there. I have this tape recorder, and I showed it to her, and I said, I'm gonna have it on. and then I started it before we went in the room.

Q. Okay. Before you went in the room did Mrs. Mauro agree to see, still want to see her husband, Carl Mauro, under those conditions?

(p. 433) A. She said, that's okay, I don't care. I just want to talk to Carl.

Q. Was she—well, strike that.

Your Honor, I would offer Exhibits 31, 32, 33 and 34 for the purpose of this hearing.

Mr. Aspey: No objection.

The Court: They are admitted.

Mr. Prost:

Q. Did you, in fact, tape record in the interchange between Mr. and Mrs. Mauro?

A. Yes, I did.

Q. About how long did it take?

A. I think it's only about ten minutes.

Q. Do you have the tape with you?

A. Yes, I do.

Q. Did your department prepare a verbatim transcript of that interview?

A. Yes.

Q. Officer, can you—I want to find that—I think it's 25.

Okay, I'll hand you what's been admitted as Exhibit 26. I believe yesterday you identified that as containing a verbatim transcript of the tape in question?

A. Yes. There are a couple of comments that I made to Carl at the end which don't appear on here.

(p. 434) Q. Well, I'm going to ask to you [sic] play the tape momentarily and we'll get it all in and I'll ask that the reporter, if possible, transcribe it as accurately as she can, what it said, so it will all be in the record.

The Court: It's already in the record on the transcript that's been made. Why do another one?

Mr. Prost: That's—Your Honor, I think the tape, there are statements at the conclusion of the tape that do not appear in the transcript that's in Exhibit 26. I think there is a couple of brief exchanges between Detective Manson. I just want to be sure those are in the record. I think just simple questions like, are you doing all right, Carl, and he says no or something like that. They are not of any moment, but to be as fair as possible, I want to make sure that they are all in.

The Court: I will make an appropriate decision when the time comes.

Mr. Prost: Very well, Your Honor.

Q. During the course of the interchange between Mr. and Mrs. Mauro, can you describe Mr. Mauro's demeanor?

A. Yes, it's very much like it is today. He's barefoot like he is today. He is looking intense as he is today, very similar.

Q. Was that the first time that you had seen Mr. Mauro?

(p. 435) A. No, it was not.

Q. Do you have that tape with you?

A. Yes, I do.

Q. Would you now play it for the Court, and Your Honor, I would prefer, if possible, not to mark the tape in evidence itself, unless, so we can have it available for preparation of the case, unless the Court wishes to review it in private, and certainly we can do that, as well.

The Court: Mr. Aspey.

Mr. Aspey: Your Honor, I have no, no position on this matter. I'll just leave it to the discretion of the Court.

Mr. Prost: Or if the Court would like to, if the Court would prefer it be marked in evidence, perhaps there could be a stipulation it could be released to us and held in custody in our offices.

The Court: I'm at a loss. Is there some difference between this tape and the tape that you did have marked and admitted yesterday afternoon?

Mr. Prost: Yes.

The Court: I think the tape should be marked and admitted. If you want to ask for it's release from the Clerk's custody, that can be done.

Mr. Prost: Very well, Your Honor.

(p. 436) Would you hand me the tape.

(The witness complies.)

Mr. Prost: I agree with Your Honor that's a better procedure, to protect the record.

Mr. Prost:

Q. I'll hand you what's now been marked for identification as Plaintiff's Exhibit 39.

Marleah, this hasn't been admitted yet.

The Court: That's true. You haven't offered it yet.

Mr. Prost: You have shown it as admitted.

Q. And ask you to identify what's now been marked as Exhibit 39?

A. This is the tape I made of Mr. and Mrs. Mauro on the date of his arrest.

Mr. Prost: Your Honor, I would now offer for purposes of this hearing Exhibit 39 in evidence.

The Court: Is there any objection?

Mr. Aspey: Your Honor, subject to the constitutional objections which I raised in my memorandum, I have no objection.

The Court: It is admitted.

Mr. Prost: Thank you, Your Honor.

Q. Would you now play the tape, that portion of the tape containing the interchange between Mr. and Mrs. (p. 437) Mauro.

The Court: I will not require the Court Reporter to transcribe this because my experience has been that these things are very difficult, the voice quality is generally marginal. If there is some material at the end of the tape which is not on the transcript which has already been prepared, I might ask her to try to get that down, if —

Mr. Prost: Very well, Your Honor.

The Court: If the audio quality is good enough.

Mr. Prost: Your Honor, do you have before you the transcript?

The Court: I have it now. This is Exhibit 26.

Mr. Prost:

Q. Detective Manson, can you now play the tape and hold it up to the amplification system so it can be heard?

A. I'll clue you in when it's time.

(The tape is played.)

The Court: Stop it there.

That's the end of the transcribed conversations on Exhibit 26. Is this additional matter that you were talking about on the tape now?

The Witness: Yes, sir.

The Court: I think we can probably pick this up,

(p. 438) the quality is better than I thought it might be, so I will ask the reporter to try to get this additional information now.

Go ahead and turn it back from the tape.

(The following is an attempt at reporting the audible portions of the tape by the Court Reporter:

Mr. Manson: How you doing, Carl, hanging in there? You all right?

Mr. Mauro: I can't answer a question.

Mr. Manson: I didn't ask you anything, I just want to know if you're doing all right.

Mr. Mauro: Why your so concerned with my comfort.

Mr. Manson: No, I'm not.)

The Witness: I don't believe there is anything more. I can speed it up.

The Court: Turn it off.

The Witness: That was it.

The Court: There are some illegible portions, sorry, not illegible, but inaudible portions there. I did follow through Exhibit 26 as I listened to the tape, and it appears to be quite accurate.

(p. 439) You may continue your questioning.

Mr. Prost:

Q. Detective Manson, for the record, can you identify the female voice who appeared to be upset on the tape?

A. That's Linda Ann Mauro.

Q. And can you identify the male voice—I believe there are—specifically, the voice that was telling, appeared to be telling her to shut up?

A. That was Mr. Mauro.

Q. And there was a third male voice, which was your own?

A. Yes. Now in the very beginning of the tape someone states: Will you step out, Bill. That was Sergeant Allen instructing Detective Trimble to leave.

Q. I notice you could hear typewriters and such?

A. That's correct.

Q. Is that because the door was left open?

A. That's correct.

Q. And they were also picked up on the recording?

A. Yes. Now the door wasn't all the way open. It was ajar.

Q. At about the point that you just turned off the tape, was that also about the time that you left?

(p. 440) A. When the tape ended, I left.

Q. Oka Who replaced you, to keep Mr. Mauro in custody?

A. I'm not sure. I think Sergeant Allen was outside. He directed somebody to stay with him.

Q. Okay. Do you also have a—did Detective Trimble also provide you with a tape of the reading of the Miranda rights?

A. Yes.

Q. Could you play that tape, as well, please?

A. Yes, I could.

Q. I think first I shall have that one marked and admitted before it's proper to play it.

Mr. Prost:

Q. Can you identify what's now been marked as the Exhibit 40?

A. Yes, sir, this is the tape I received from Detective Trimble.

Q. And does that tape contain the—does it contain the recording of the reading of the rights as set forth in the transcript that I have marked as an exhibit earlier?

A. Yes, sir.

Mr. Prost: I would offer Exhibit 40.

Mr. Aspey: No objection, subject to the (p. 441) constitutional objections earlier made in the record, Your Honor.

The Court: Exhibit 40 is admitted.

Mr. Prost:

Q. Could you now play that portion of Exhibit 40 that contains that brief interchange between Trimble and Mr. Mauro.

The Court: Has this been transcribed?

The Witness: Yes, sir.

Mr. Prost: Yes, it has, Your Honor. It was, I'll find the exhibit and present it to the Court.

Mr. Prost: Your Honor, it's Exhibit 28 that I hand to you.

The Witness: Would you like it played now, Your Honor?

The Court: I think there is no need—the question was directed to me.

Mr. Prost: Yes.

The Court: When Your Honor is used, then I'm the one that should answer such a question and not counsel.

The Witness: Did you want it played now?

The Court: I see no need to have the reporter transcribe this, since it has already been transcribed on Exhibit 28. I will check it for accuracy as we listen to the tape. You may go ahead and play it now.

(p. 442) (The tape is played.)

The Witness: I don't believe there is anything further.

The Court: There is an indication of further material on Exhibit 28.

The Witness: Oh.

The Court: Before that it says long silence.

The Witness: I can speed up the silence, if you'd like.

(The playing of the tape continues.)

The Court: That concludes the transcribed material on Exhibit 28.

Is there anything more on the tape?

The Witness: I don't believe there is.

The Court: You may turn it off.

(The witness complies.)

The Court: It appears to me that this is an accurate transcription of the tape, which we have on Exhibit 28.

Mr. Prost: Your Honor, I noted one error, I think, in the reading of the rights, where it says, you can decide at any time to exercise these rights by answering any questions or making any statements.

As I heard the tape it was without answering any questions or making any statements. That was my (p. 443) understanding of it.

But in any event, the tape is in evidence for purposes of comparison.

Mr. Prost:

Q. After the interchange between Linda Mauro and Carl Mauro, did you, in the presence of other officers—first of all, where did you take Linda Mauro?

A. Next door to Captain Madden's office.

Q. And after that did you take photographs and obtain evidence from Mr. Mauro?

A. Yes.

Q. Could you, first of all, describe your, state your purpose in taking such evidence and taking photographs?

A. Well, to gather as much information as possible about Mauro, any physical evidence under his fingernails, skin tissue, blood, fibers, hairs, to photograph his physical state at that very moment.

Q. Were those photographs taken by Detective Blair?

A. Yes, they were.

Q. In the course of taking those photographs was it necessary to give directions to Mr. Mauro?

A. Yes, it was.

Q. Did you have him assume various, you or (p. 444) Detective Blair, have him assume various poses?

A. Yes.

Q. And was, did Mr. Mauro—was he able to follow those directions?

A. Very easily.

Q. I'll ask you the same question with regard to the taking of evidence from his fingernails. Was it necessary—did you do that yourself?

A. I clipped the nails, yes.

Q. Did you have to give directions to Mr. Mauro?

A. Other than give me your hand, and I'd take a finger, like his thumb, and then he'd offer his pointing finger, then on down the line.

Q. Did he appear able to, when you—did you ask him for his hand or his arm?

A. Yes.

Q. Was he able to follow that instruction?

A. Yes.

Q. And then you would take evidence from each of his fingernails?

A. Yes.

Q. Did you then ask him for the other arm?

A. Yes, I did.

Q. Did he follow that instruction?

A. Yes.

(p. 445) Q. Did he appear to have any difficulty whatsoever in following your directions?

A. No, sir.

Q. Did he appear to have any difficulty whatsoever in following the directions during the photography by Detective Blair?

A. No.

Q. Were any other officers present while this was taking place?

A. Yes, Sergeant Allen assisted me in the collection of the fingernails, and I believe that Captain Latham was there, as well.

Q. I'll ask you to identify what's been marked as Exhibit 37?

A. 37 is defendant Mauro as he was photographed in Captain Latham's office. This is against the door.

Q. Was that one of the poses that Detective Blair asked him to assume?

A. Yes.

Q. Throughout your contact—strike that.

We would offer Exhibit 37 for this hearing.

Mr. Aspey: Your Honor, no objection.

The Court: It is admitted.

Mr. Prost:

Q. Throughout your contact with him, did Mr. (p. 446) Mauro appear to—did you have eye contact with him from time to time?

A. From time to time, yes.

Q. During those times did he appear to have good eye contact?

A. When he looked at you in the eyes, it was directly in the eyes. I had the chance to observe him from just a few feet away.

Q. Have you had the opportunity to observe Mr. Mauro in the courtroom today?

A. Yes.

Q. Did he—would you be able to compare the way he appears today with your recollection of him on November 23rd, 1982?

A. Yes. He was heavier, but he would give eye contact like he is now. Occasionally he would smirk like I have seen in the courtroom. He was sitting more forward in his chair. He appeared to concentrate like he is now. He appeared alert, as he is now.

Q. Do you recall whether he was perspiring or sweating?

A. No, he wasn't, during my contact.

Mr. Prost: I have no other questions.

The Court: Mr. Aspey.

Mr. Aspey: Yes, thank you.

(p. 447) CROSS EXAMINATION

By Mr. Aspey:

Q. You have indicated, Frank, in your testimony today that Linda Mauro was a suspect in the crime when she was interviewed by you at the Police Station?

A. That's correct.

Q. Did you advise her of her Miranda rights?

A. On more than one occasion.

Q. At the Police Station?

A. Yes, sir.

Q. Is that the only location she was advised of her Miranda rights?

A. No, following day I advised her of her rights again.

Q. Where was that?

A. In Mr. Prost's office.

Q. Was that when you took a subsequent interview of her?

A. Yes, sir.

Q. Other than those two occasions, did you advise her of her Miranda rights on any other occasions?

A. Yeah, I think about three times. On my first interview in the station, I verbally advised her of her rights.

Then when I interviewed her a second time on the 23rd, I asked her if she still understood her rights, and (p. 448) she says, I don't think so, so then I readvised her of her rights and had her say back what each sentence meant, like you have the right to remain silent. I asked her, do you know what that means, and she would tell me that, and then the third occasion on the following day.

Q. At what point in time did you make the determination that she was no longer a suspect?

A. I haven't.

Q. You haven't made that determination today?

A. No.

Q. Did you ask permission from Linda to tape record the interview?

A. Did I ask permission?

Q. Yes?

A. No, I told her I was going to tape it.

Q. Did you ask for her permission?

A. No, I didn't.

Q. Did you ask my client for permission to tape record the interview?

A. No, I didn't.

Q. Were you aware at the time that you went in to interview my client that his mental health was an issue in the case?

A. That had been brought up by Mrs. Mauro, yes.

Q. In fact, we went into this a little bit (p. 449) yesterday, but isn't it true that in your initial interview with Linda that she gave you a rather extensive history of my client's mental health problems?

A. It got more extensive with further interviews, but, yes, I did know that he had past hospitalizations, more than one.

Q. And had you spoken to any of the officers at the scene at K Mart?

A. Yes, sir.

Q. And so apparently you knew he had exhibited some rather bizarre behavior at K Mart?

A. I'm not sure on that. We discussed the body in the suitcase and how it was located, but I didn't have a lot of contact with the officers at the scene.

Q. Well, did you know that he had appeared at K Mart claiming to have killed the devil, things of this nature?

A. I don't know if I was at that time at the discovery or when I found the little boy.

The Court: I'm going to interrupt here. We will recess for lunch until 1:30.

Recess taken—11:58 o'clock a.m.

(p. 450) Proceedings in Open Court

1:32 o'clock p.m.

The Court: Thank you. Be seated, please.

The hearing will continue.

Mr. Prost: Your Honor, I believe Mr. Aspey was in the middle of his cross examination.

Mr. Aspey: Yes.

CROSS EXAMINATION RESUMED

By Mr. Aspey:

Q. Frank, when we broke I believe I was asking you questions concerning whether or not you had advised Linda Mauro of her Miranda rights, and as I recall, you indicated that you did on two or three occasions?

A. Yes, sir.

Q. And that was because you believed that she was a suspect?

A. Yeah, I didn't know if she would be or wouldn't be at that time, so I just thought I'd cover that right out front.

Q. What was the purpose of taping the interview?

The Court: Do we refer now to the interview of November 23rd?

Mr. Aspey: Yes, sir, I'm sorry; I will rephrase (p. 451) it.

Q. What was the purpose of taping the interview between Linda Mauro and my client, Bill Mauro?

A. A couple, two—she would talk so fast I just wanted to listen to her and not have to interrupt her by taking notes, and also to preserve the whole conversation at that second interview.

The Court: I'm not sure that we are tracking together.

I think Mr. Aspey's question talked about her visit with her husband.

The Witness: Oh, I'm sorry, I thought it was my interrogation or interview with her.

Mr. Aspey:

Q. No, I was referring to the interview with, maybe interview is the wrong word, the conversation between Linda Mauro and the Bill Mauro?

A. Oh. the purpose for that?

Q. Yes.

A. I didn't know it either one was working together and I wanted to just preserve their conversation, whatever statements were made by her or Mauro himself.

Q. You say you didn't know if they were working together?

A. Yes. In other words, I thought it would be (p. 452) improper for them to get together and, let's say, him tell her what to tell the police or her tell him what to tell the police or make a story together.

Q. You were aware going into that interview that my client had invoked his Miranda rights?

A. Yes, I did.

Q. In fact, Billy Trimble told you, didn't he?

A. Yes.

Q. Certainly—

A. In fact, Sergeant Allen had told me also that he had given Mauro his rights in the field.

The Court: Again, I'm not sure we are talking about the same thing. Mr. Aspey, I think, is asking you whether you were aware that Mr. Mauro did not want to say anything until he had an attorney present?

A. Yes, I was aware.

The Court: All right.

Mr. Aspey:

Q. Frank, certainly you were aware that during the conversation either Linda or my client may have given an incriminating statement?

A. Yes.

Q. And obviously one of the purposes of your tape recording the interview was to take down any such statements?

(p. 453) A. Yes, sir.

Q. Did my client appear to have been involved in an altercation of some sort?

A. Well, he didn't look so much like an altercation, his clothes weren't torn, but he had some scrapes and he was dirty.

Q. I believe one of the earlier witnesses described his clothing as being dirty, his shirt?

A. Yes, it was.

Q. So then when you say today that his demeanor is similar to his demeanor on the night that you talked to him at the Police Station or the morning that you talked to him at the Police Station, you're not referring to his physical appearance, are you?

A. No, no. In fact, he's thinner than he was then.

Q. When did you first become aware that my client claimed that he had killed the devil?

A. I'm not sure. I'm sure it was that day, but I don't know at what point.

Q. Would that have been in your interview with Linda?

A. That he had claimed to kill the devil?

Q. Yes.

A. I don't know.

(p. 454) Q. Okay. Certainly after the interview between Linda, or, excuse me, certainly after the conversation between Linda and Bill you became aware of that, that morning?

A. At some point, yes, excuse me, at some point during the day I did receive the written statements themselves from the people at K Mart and was able to talk to the officers at length.

Q. Did Linda Mauro tell you or describe Carl's behavior the morning of the homicide?

A. Yes.

Q. Did she describe his behavior to you that two or three days before the homicide?

A. Yes, she did.

Q. And were you aware of that behavior going into the conversation between Linda and Carl?

A. Yes.

Q. Would you describe for the Court what Linda told you concerning Carl's behavior the three days or so before the homicide?

A. She would use words like wacky, bizarre, weird, out of it, this type of term.

Q. Crazy?

A. I think she did use that, yes.

Q. Did she describe a set of circumstances to (p. 455) you during that period of time wherein my client allegedly believed that spacemen were coming to the trailer?

A. Yes.

Q. What did she tell you in that regard?

A. That the spacemen were gonna take the souls of everybody in the trailer.

Q. And did she describe his behavior inside the trailer during this period of time?

A. Yes, she did.

Q. What did she tell you?

A. Sleeplessness, wacky, bizarre, crazy, insane asylum, things like that.

Q. And again I think I hit this before lunch but I want to make sure the record is clear on it, she told you that he had been hospitalized numerous times in the last ten years?

A. Yes, she did.

Mr. Aspey: Just one moment.

That's all the questions I have. Thank you.

The Court: Mr. Prost.

REDIRECT EXAMINATION

By Mr. Prost:

Q. Yes, Frank, once again, what was the primary reason for your being present during that conversation (p. 456) between Mr. and Mrs. Mauro in the first place?

A. Well, I suppose the reason that outweighs the others immediately would be safety, security for Mrs. Mauro.

Q. And you were—isn't it correct you were still holding Mr. Mauro for taking the photographs and other physical evidence from him?

A. That's right. We weren't finished with him.

Mr. Prost: Okay. I have no other questions.

The Court: You may step down.

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IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA,)
Plaintiff,)
vs.) No. 10056
WILLIAM CARL MAURO,)
Defendant.)

Flagstaff, Arizona

December 2, 1983

EVIDENTIARY HEARING

Volume 4

BEFORE: HONORABLE RICHARD K. MANGUM,
Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

• • •

[CROSS EXAMINATION]

[By Mr. Prost:]

• • •

(p. 646) Q. You've also heard a tape recording of a conversation between Linda Mauro and William Carl Mauro on November 23rd at the Flagstaff Police Station?

[By Dr. Gerstenberger:]

A. Yes, I have.

Q. In your opinion—and that tape recording, and I'll state for the record that's been entered in evidence in this proceeding as Exhibit 39, as well as a transcript whose number I do not know, in your opinion were the statements made by Mr. Mauro, the defendant, during the course of that tape recording voluntarily made?

A. Yes.

Q. In your opinion as a psychiatrist, do you feel that all of these statements that I have just asked you about should be considered by the jury when they consider this case?

A. It's my belief that they should. My own feeling is I think the jury should be allowed access to the information so that they can evaluate it themselves.

• • •

[By Mr. Prost:]

(p. 649) Q. As—according to Officer Harris, as Mr. Mauro approached the logpile where the body was located he made statements, several statements about being executed or placed into prison for what he had done but he had to do it. Does that statement indicate to you that at that point he understood the consequences of murder?

A. Yes.

Q. As you recall the taped conversation between Linda Mauro and Carl Mauro, Exhibit 39 that we played

for you, did Mr. Mauro appear to be in touch with reality as based upon the tone of his voice and his demeanor as stated, as it appeared on that tape?

A. Okay. Let me—let me say a qualified yes. The qualification is in the fact that during the time someone is acutely psychotic he can have brief periods of being more in touch with reality.

Q. And was this, appear to be one of those times when he was more in touch with reality?

A. Yes.

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[REDIRECT EXAMINATION]

[By Mr. Aspey:]

(p. 656) I am referring again from Corporal Harris's report, which is in evidence. While the subject was speaking, again referring to Bill, I noted that he was quite hysterical, screaming that he had killed his son because he was possessed by the devil and he had to do it. As he was speaking I noted that his speech was very broken and hard to understand.

Again, can you express an opinion on your scale on that statement?

[By Dr. Gerstenberger:]

A. On that I'd give him, based on the description, not necessarly on the statement, but on the description from the officer I'd give him about a 2 and a half.

Q. Now regarding the statements concerning being executed and I'll take the rap, where would you place that on your scale?

A. At that point I would—okay, that was still at the time he was out at the K Mart?

Q. Right, uh-huh.

A. I would rate that entire period as being about a 2. I don't think that he reached an acute psychotic state at all, acute being as out of touch with reality as he had been earlier during all of that time.

Later in the jail, based on the tape I heard of his talking with his wife I'd drop it down to about a 1. I (p. 657) think at that point he was more deflated, more in touch with reality, but at that point I'd still say he was, on my scale of 0 to 3, he was still a 2—

Q. Referring to the statement that I just gave you—

A. —for that entire time.

Based on my reviewing those, I would say any of the statements during that time would still fall in that range. You have to remember that at the present time we are taking those out of context. We are taking isolated statements.

Q. Yes, I understand. It's easy to do that.

Let me give you another statement. Apparently Mauro and the officers went to the location where the suitcase was near some logs and as the officers removed the logs to reveal the suitcase the following occurred.

As I began removing the logs Mauro again became hysterical, wanting me to hurry up and open the suitcase, stating it's not human, it's still moving.

Where would you place that statement on your scale?

A. At that I would put it back about a 2 and a half.

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IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA,)
Plaintiff,)
vs.) No. 10056
WILLIAM CARL MAURO,)
Defendant.)

Flagstaff, Arizona

January 24, 1984

BEFORE: HONORABLE RICHARD K. MANGUM,
Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume 12

TRIAL

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(p. 2024) BRUCE GRIFFEN,

called as a witness herein, having been first duly sworn be the Clerk, took the stand and testified as follows:

DIRECT EXAMINATION

By Mr. Aspey:

Q. Would you state your name, please?

A. Bruce S. Griffen.

Q. What is your occupation?

A. I'm an attorney.

Q. Are you in our law firm?

A. Yes, I'm a member of Aspey, Watkins and Diesel.

Q. How long have you been practicing law?

A. Five years.

Q. Where have you been practicing during that period of time?

A. I graduated from law school in 1978, took the Bar and then went to work as an attorney for the federal government in Washington D.C.

Q. How long were you employed in that capacity?

A. Just over a year.

Q. And since that time where have you been (p. 2025) practicing?

A. I joined the firm of Aspey, Watkins and Diesel in approximately 1979. I have been employed in that capacity since that time.

Q. Do you have any area of emphasis in the firm that you concentrate in?

A. Yeah, I think as everybody, the prosecution and you are aware, I primarily deal in the area of criminal defense work thorugh the firm's relationship with the county as the Public Defender, in essense.

Q. Are you certified as a criminal law specialist?

A. Yes, I recently received certification from the State of Arizona, been certified as an expert in the practice of criminal law.

Q. Have you handled cases wherein the insanity defense has been raised in the past?

A. Yes.

Mr. Prost: Objection, Your Honor, irrelevant.

The Court: Overruled. The answer will stand.

The Witness: My answer was, yes, many times.

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[By Mr. Aspey:]

(p. 2033) Q. What did you observe when you went down to the county jail?

[By Mr. Griffen:]

A. I first checked at the county jail and found that indeed, as one of the officers told me, and I am familiar with all the people at the jail, that there was indeed an individual in custody. His name was Mauro. It was a

murder type case, and that's the information I initially got.

Q. Did you speak to Mr. Mauro when you went down initially?

A. My recollection is that I did not speak to him right away. I went back, called my law office. I thought somebody else should come down with me, and I believe another member of my firm came down and met me at the jail.

Q. Do you recall who that individual was?

A. Donald Bayles.

Q. What occurred when you and Mr. Bayles—well, did you and Mr. Bayles see Mr. Mauro?

A. We were given permission by the jail staff as, and again we are familiar with the jailers personally, they know us to be the attorneys that do most of the work in the jail, and we were given permission by the jail staff to enter the jail facility, and then requested (p. 2034) permission to meet with Mr. Mauro in the cell that he was in, one of the drunk tank cells down on the base level of the jail, and were given permission by the jail staff to go ahead and enter into his cell and make contact with Mr. Mauro.

Q. Which cell was he in, do you recall?

A. Described—I do recall—describing it best for the jury, there is a series of cells on the bottom floor of the jail going from west along east way, there is approximately four cells and they are numbered, and my best recollection is that he was in this furthest cell to the west, I think that's Number 4. It's a drunk tank, as we commonly refer to it, and Mr. Mauro was in that cell.

Q. Would that be A-1?

A. It might be A-1 or A-4. I'm not sure which way the numbers go. It's the furthest one to the left as you are looking at the jail cell.

Q. What did you observe what you entered the cell?

A. Mr. Bayles, somewhat to my surprise, Mr. Bayles entered the cell first. I was right behind him. The jail cell is set up that there is a, sort of a concrete type slab where you can place a mattress along the far wall. Mr. Mauro was back on that slab. That's (p. 2035) the first thing I observed.

Q. Were you afraid to go in the cell?

A. Yeah—yes, as I indicated in my interview to you and the State, I wasn't real excited about going into his cell. In fact, I was somewhat surprised that Donald Bayles walked in in the fashion he did because I was a little hesitant to do so. You are able to look through the cells through a small opening, and in my opinion Mr. Mauro's behavior was somewhat unusual and I wasn't real excited about going in.

Q. What did you observe after you actually went in the cell?

A. The only person in the cell was Mr. Mauro. His demeanor and behavior was, in my mind, quite unusual. When I first saw him, he was over huddled in the corner, far corner of the cell. I don't recall his clothing or anything like that.

I do recall the first thing that struck my mind and something that bothered me personally was the fact that

there was a quantity of saliva or slobber that was coming out of the corner of his mouth.

The rest of his demeanor, he was not talkative in any way. He said nothing to me personally. He made no verbal comments to us while we were in the jail at the initial time. He was staring, he didn't appear to even (p. 2036) realize that we were in the cell trying to talk to him, the type of thing where you could literally wave right at him (indicating) directly in front of his face and there would be no response. His breathing was wierd.

Q. What was his breathing like?

A. It seemed to be not regular and somewhat loud, excited.

Q. Was he shaking?

A. He was—he was sort of in a catatonic, trancelike state. I didn't notice any, any tremendous quaking or shivering, but he was fixed, very trancelike, catatonic. I didn't really, I don't recall any tremors like you would see with an alcoholic who was in withdrawals or something like that. I didn't see that. Idon't recall that.

Q. Was he perspiring?

A. He was having some—he had a clammy appearance. His mouth was very dry; again, there was saliva, and there was perspiration quite notable.

Q. Were you able to communicate with him?

A. Not in any way.

Q. Did you attempt to communicate with him?

A. As a lawyer, there are certain things that you do with somebody when you first see them, and this was the first opportunity to see Mr. Mauro.

(p. 2037) We did try to communicate with him. We did try to explain that we were attorneys practicing law, that we were appointed, we were there to assist him, to try to answer any questions he may have, to try to make him understand what the proceedings, why he was in jail, what was going on, what he could anticipate. We went through that standard type of explanation a number of occasions, and there was no response given.

Q. What was the next thing that you did?

A. Well, based upon what I saw, I didn't think that he needed a lawyer. I thought he needed a doctor, and I made arrangements to try to call somebody with the Coconino Community Guidance Center, who was, like Mr. Prost says, who is a doctor who can better understand the things, and ultimately made arrangements and got ahold of Doctor Dean Gerstenberger.

Q. Who is Doctor Gerstenberger?

A. He's a—he's a doctor with the Community Guidance Center here in town, and he's one of several doctors that the attorneys of the State and ourselves use very commonly to evaluate people who have mental health problems, both in civil problems and criminal problems, he's a doctor that we use all the time.

Q. He is a psychiatrist?

A. I believe so, yes. I should say we weren't (p. 2038) looking for, specifically, Dean Gerstenberger.

We called the Community Guidance Center to get any doctor that was available, and evidently Mr. Gerstenberger or Doctor Gerstenberger was on call and they were able to reach him.

Q. And did Doctor Gerstenberger come down to the jail?

A. I know that he ultimately did, but I was not personally present and had nothing further really to do with what the doctor did.

Q. Bruce, drawing on your experience over the last five years, can you express an opinion as to Mr. Mauro's mental state that day in the jail?

A. Yes, I could.

Q. Would you relate that to the jury?

A. Based upon what I saw and I'd like to also say that I thought that he was—I was very uneasy—I thought he was very explosive, I thought there was, at any time there could be some sort of a change in his behavior even though he was very trancelike when I saw him. I would have to say that of the many people that I have seen in the jail over the years unquestionably Mr. Mauro was a very disturbed individual, experiencing—I'm trying to put it in fancy words for you—the bottom line was I thought he was crazy. I thought he had severe mental problems, he needed a doctor.

(p. 2039) Q. Did it appear to you that Mr. Mauro was malingering in any way?

A. Not in the slightest. I don't see how a person could, could make up, fabricate the kinds of things that I saw (indicating). I sure never thought that at all.

Mr. Aspey: That's all the questions I have.

The Court: You may cross examine.

* * *

(p. 2050) CROSS EXAMINATION RESUMED

By Mr. Prost:

Q. Mr. Griffen, as I understand from the interview we conducted of you, this encounter with Mr. Mauro lasted approximately ten minutes, is that correct?

[By Mr. Griffen:]

A. Speaking specifically in that cell?

Q. Well, did you see him other than in the cell that day?

A. Well, I think that probably in the cell, probably that's accurate. It wasn't—it wasn't a very long period of time, no.

Q. And during that ten minutes, you observed him engaging in various behavior, did you not?

A. His behavior didn't change very much. I mean he was definitely exhibiting behavior but it wasn't changing very much, no.

Q. Well, for awhile he was pacing the floor, wasn't he?

A. He moved after awhile, that's correct.

Q. Well, do you recall discussing that during the interview? Do you recall—

A. I honestly don't remember the interview too well, but if I said he was moving, he did move, there is no question about that.

Q. You recall when we interviewed you at your (p. 2051) office?

A. Yes, sir.

Q. And Mr. Aspey was present, Mr. Adams asked you questions?

A. Yes.

Q. I just sat and listened, I think.

Do you recall for awhile he was curled up?

A. It sort of went like this, as I recall, the best I can, Mike, when I first was in the cell my recollection was that he was in a curled up position on the cement ledge where they normally have a mattress if somebody's spending the night. That's the best of my recollection, and then at some point in time he got up, he was motionless for a period of time, and then at some point in time he began to walk. That's the way I remember his conduct as going.

Q. That's a rather small cell, isn't it?

A. Maybe half the size of the jury box, I. . .

Q. So if he was walking he'd have to change directions, isn't that correct?

A. Well, yeah, well, if he went to one end, you obviously have to turn around to come back, that's true.

Q. So you observed him pacing back and forth at least sometime during the ten minutes, is that correct?

A. Well, it wasn't—yeah, I mean he went, he (p. 2052) did move and change directions, come back and forth, but it wasn't like a, it wasn't like a beaten path back and forth, back and forth. That's not the way I recall it.

Q. So he was kind of walking all over the cell?

A. Sometimes he'd, he stayed mostly to the—I stayed mostly towards the door, and he stayed mostly back to the left, and from the corner, walking along the far, what would be the northern wall. It's not that much room to move around. There was three people in the cell, so his movement was most against the wall.

Q. But he was standing up and moving, walking?

A. Did move, yes, yes.

Q. And for awhile he was just standing stationary, too, wasn't he?

A. Yes.

Q. And he walked back and forth, as I review your interview—

The Court: I think we have that established.

Mr. Prost: Very well, Your Honor.

Q. When he got up from the bench and started walking back and forth, you didn't help him up, did you?

A. No.

Q. He got up by himself?

A. The best I can recall. I didn't have anything to do—I didn't touch the man.

(p. 2053) Q. You were afraid of him, weren't you?

A. I was.

Q. All right. In your mind he was capable of a violent behavior?

A. I didn't know that. I just—I don't know what you'd call it, call it perception. I have been in the jail hundreds and hundreds of times and I did not have that feeling before, that an individual in my mind was so out of it that you didn't know what he would do, and I have never seen an individual in the past exhibit those kinds of signs. I just didn't know what would happen.

I can't—I just wasn't real happy to be in the cell, to be honest. I'm not real proud of the fact that I'm sitting here saying it.

Q. Well, you were afraid of for your own well-being, weren't you?

A. Well, I was. Any time you are locked in a cell and the door is shut behind you with an individual who doesn't appear to be in any way rational, I don't think that anybody wouldn't have some concern for themselves.

Q. Now you used the word, catatonia, during your testimony in response to Mr. Aspey's questions. You recognize, don't you, that that's a medical term?

A. I think it does have a certain legal or (p. 2054) medical significance, yes, I recognize that.

Q. And I presume that you would, in your judgment as to whether this man was catatonia, as, catatonic, you would defer to Doctor Gerstenberger, the doctor that you had called, wouldn't you?

A. I certainly would rather have a professional make the analysis than myself. When I said catatonic, I mean that to be speechless, in essense, motionless, nothing much going on, no response to questioning.

Q. My question was, you would defer to Doctor Gerstenberger's judgment on that point on November 23rd, 1982, wouldn't you?

A. As to whether he was catatonic?

Q. Yes.

A. Maybe I used the phrase wrong. I'd certainly let him define it. What I saw is what I saw. I put the phrase, catatonic, with it. I thought it fit.

Q. My question was, would you defer to Doctor Gerstenberger as to whether or not this man was catatonic on November 23rd, 1982?

A. I'd—whatever Doctor Gerstenberger saw, he saw. I'd let him tell you what he saw.

Q. Now while you were in the cell with Mr. Mauro during those ten minutes with Mr. Bayles, I assume—would it be fair to say that you don't know whether or not (p. 2055) Mr. Mauro was making a conscious decision not to talk to you?

A. You have to run that one by me again.

Q. You don't know whether Mr. Mauro was choosing not to talk to you while you and Don Bayles were in the cell with him?

A. I don't know what Mr. Mauro thought what he was doing or not. I don't know what Mr. Mauro was thinking. I don't know that. I could tell what you my perception was, but . . .

Mr. Prost: I have no other questions.

The Court: Redirect.

Mr. Prost: Excuse me, Your Honor.

No other questions, Your Honor.

REDIRECT EXAMINATION

By Mr. Aspey:

Q. Mr. Griffen, did you have occasion to observe Mr. Mauro in the county jail in the months following his arrest?

A. Yes, I did.

Q. Did his behavior improve over the months?

A. Well, it changed. In my capacity as being an attorney with other individuals, I would often have to go inside the jail, inside certain of the cells to talk to (p. 2056) the people that I have been assigned to represent, and the one area where they keep the people where they have mental health problems, I would have to go in and see some of the other individuals, in that time I would be talking to somebody and I would see Mr. Mauro in there, and he would acknowledge my presence and say hello to me and try to talk to me, which was obviously different than before.

Q. Would it be fair to say that his mental health improved over the months that you observed him in the jail?

A. Well, I think that would be fair to say because normally when you go and see somebody for the first time, they want to talk to you. They want—they are glad to have an attorney present. They have a lot of questions. They are relieved that they have counsel. They want to use you.

Mr. Mauro had nothing to do with us the first time we were in there. He didn't have any considerations as

to, in my opinion, whether I was the man from the moon. He didn't care.

Later on when I was in the jail, seeing another individual who had a mental health problem, getting prepared for some sort of hearing, he'd want to talk to me. He'd want to try to ask me questions, and I'd have to try to defer him away, so he seemed like he wanted to use (p. 2057) an attorney later on and at the beginning he didn't want to talk, so there was a change and I don't know if you call it improvement. There seemed to be consciousness that, as to wanting to try to utilize the services of a lawyer, which wasn't present to begin with.

Q. Was Mr. Mauro kept in cells where other psychotic people were held in the county jail?

A. Well, I think—well, the jail—

Mr. Prost: Your Honor, I am going to object. This is way beyond the scope of cross.

The Court: It is beyond the scope of the cross examination.

Are you asking leave to reopen to go into new matter?

Mr. Aspey: Yes, Your Honor.

The Court: Permission granted.

Mr. Aspey:

Q. Was Mr. Mauro kept in the section of the jail where other psychotic people are kept?

A. Yes, the jail segregates where they keep certain people, and those with—I don't know who makes the de-

cision—those with perceived mental health problems are kept in one area away from certain other people and Mr. Mauro was—I remember some of the other people I saw—Mr. Mauro was up in K Dorm or L Dorm or

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA,

Plaintiff,

vs. NO. 10056

WILLIAM CARL MAURO,

Defendant.

Flagstaff, Arizona

January 25, 1984

BEFORE: HONORABLE RICHARD K. MANGUM, Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume 13

TRIAL

* * *

[DIRECT EXAMINATION]

* * *

[Dr. Gerstenberger]

(p. 2355) The Witness: Okay.

I received a call from Bruce, asking me to go to the jail to evaluate someone. I cannot recall exactly what he said. I think he did mention that there was someone who was accused of having murdered his son.

At that point I went down to the jail.

Would you like me to proceed from there?

[By Mr. Aspey:]

Q. Let me ask you a couple other questions before you get started here.

You spoke to Mr. Griffen?

A. Yes.

Q. Did you subsequently go to the jail?

A. Yes, I did.

Q. Did you meet with anyone at the jail?

A. When I got to the jail, Don Bayles, another attorney with your firm, introduced himself to me. He was a new member then, and I had never met him, and he explained that he was the defendant's attorney.

Q. Do you recall the date this meeting took place?

A. This was on November 23rd, 1982.

Q. Where was Mr. Mauro at the jail?

A. Mr. Mauro was in A-1. It's a holding area (p. 2356) just across from the booking desk.

Q. At the time that you went to see Mr. Mauro on that day, had you been appointed by the Court to conduct a Rule 11 evaluation?

A. No, I had not.

Q. Why. then, did you go down to see Mr. Mauro?

A. I did it at the request of Mr. Griffen.

Q. How did Mr. Mauro present to you on that occasion?

A. First of all, I walked over to the cell and looked through the window. They have—it's a room with only a small window in the door, and I looked through and saw Mr. Mauro, and my first reaction was shock, because I had seen him before, and I was not expecting to see someone I had ever seen before.

After that, I went back and explained to Don Bayles why I was having a reaction, and then Mr. Bayles and I walked on into the cell.

Do you want me to describe the way Mr. Mauro was at that point?

Q. Yes, I would.

What does it mean when someone asks you—is this a medical term—how did he present?

A. All right. When I hear the phrase, how did he present, then to me that means what things did I (p. 2357) observe in him.

Q. Do doctors use that term quite a bit?

A. Very frequently.

Q. Okay. How did Mr. Mauro present to you when you went in to cell A-1?

A. When I walked in, Mr. Mauro was lying on a cement bunk that they have. He was staring at the ceiling, and I announced my name and asked if he reconized me. He sat up at that point and kind of looked at me and then just nodded his head. At first he didn't say anything.

The Court: Excuse me. Was that an affirmative nod or negative?

The Witness: It was an affirmative nod, sir.

Mr. Aspey:

Q. Did you, or what did you do?

A. I walked over, and after stating my name and asking if he remembered me, and he nodded, yes, I sat down and introduced Don Bayles to him, and at that point Mr. Bayles explained that he had already been in to talk with Mr. Mauro, so he had been introduced.

At that point I—at that point the only knowledge I had of what had taken place is that Mr. Mauro was arrested on a charge of killing his son.

I, first of all, asked, after the introductions, I (p. 2358) asked Mr. Mauro how he was doing, and he didn't really answer. And I asked a couple of other questions to just ascertain if he could answer, and found out that he could verbally respond.

I asked at that point what had taken place, and he —I'm referring to my notes here to help refresh my memory—and he indicated that he remembered hearing his son scream and then he became somewhat upset. I asked, "How did you get in here," and he didn't respond. He then started saying, "They're all dead. I killed them all."

At that point, I was not certain as far as who was dead. I knew that there was something about a death, but I did not know—I couldn't remember right then it was a son. I didn't know what had happened.

He then proceeded during the interview to stare ahead. The whole time he was sitting there on the bench he had very little eye contact with me. For the most part

he was staring straight ahead, and since it's a one bench in there, everybody sits in a row, he was staring ahead. He started breathing very rapidly, and then wild-eyed is the best term to describe the look on his face.

He then said, "I must be the devil."

He said, "They told me not to turn back on Jesus. I damned myself." At that point he got up and started pacing the floor. He was becoming extremely agitated, and (p. 2359) I was getting a little concerned at that point.

I tried to get him to calm back down, and eventually he did sit back down.

Q. Why were you concerned?

A. Because of the state of agitation. I—whenever—first of all, in my career I have been very fortunate in being able to tell ahead of time if someone is explosive. Because of that I have been assaulted only on one occasion, and there are many psychiatrists who are not able to make that claim. It sounds like a real claim to fame, but it can be dangerous at times. Whenever I feel a gut instinct that someone is dangerous, I respect that.

Because of the level of agitation he was displaying, also being in that we were locked in a very small cell with one window and no one looking in through the window, I started getting a little concerned for our safety.

He did calm down, though, and sat back down. He then talked about, "I must be the devil. The devil tries to make you do things."

In order to try to get a better idea of what was happening, since I couldn't tell very well from talking with him, I tried to talk about other subjects.

I had seen Mr. Mauro in February, and at that time (p. 2360) I had started him on some medication. I asked if he was still taking the medication, and during this time he was leaning forward and holding his head, still breathing rapidly—at times he'd look back up—and he informed me he had been off of medication for months. He then—right after responding that he had been off medication for months he said, "I don't think it's the devil. I blasphemed the Holy Spirit."

Becouse of the disjointed nature of that response to what he had just answered, I thought I better check to see how well oriented he was, so I asked if he could tell me his name. At this point, when I'd seen Mr. Mauro in February, he went by his middle name of Carl. So during this time I was referring to him as Carl. I asked him what his name was, and he said, "My name is William, William, William," he became very upset, and there was about a five second pause, and he said, "what's my last name," and he thought of it and said "Mauro". He seemed sort of relieved to be able to have thought of it.

You know, because he went by his middle name, I asked him, "What's your middle name," and he sat there and tried to think of it and couldn't think of it, and finally said, "I don't know," and after that it appeared that he kept trying to think of it and was unable to.

I then asked what other things he could tell me (p. 2361) that had been going on, and it appeared that he was trying to reach back in his memory and bring back whatever, whatever was there. He remembered a wall blowing down. He had been working a short while before that as a stone mason, and then he was trying to think of when that happened, and again became very upset because he

couldn't think of when it was. He said, "It seems like a long time ago. It wasn't that long, two weeks ago. Maybe it was longer than that."

Then at that point he started staring ahead and getting more upset. I again, in checking orientation, I asked him where he lives. His response was, "the El Pueblo." Right after saying that, you could see that he was trying to think, and then he said, "Am I at the El Pueblo?"

When he said that, it did not appear that he was trying to fool me. It appeared that he really was disoriented. He really did not know.

At that point I let him know that he was in jail and asked if he was having any trouble with hearing voices. He responded, "I remember voices, voices saying you have to kill them, kill them all. Did I kill them?" And at that point I responded by just sort of going—let me back up for a moment—a little bit earlier I had left the room and talked with Don Bayles a moment, then went (p. 2362) back in to talk to him some more, and at that point I knew who was dead, and so I explained to him that Linda was all right, that, and I listed off the other children and let him though that they were all right. At that point he again became very upset. I—he was very anxious and upset, but I did not feel threatened at that point.

I then asked how well he had slept the night before and he let me know that—his quote was, "I didn't. Maybe I did."

Those are the only notes I have on my first interview with him. It lasted a total of about half an hour.

At the end of the interview, he was still just sitting there staring ahead, and at that point, I left.

Q. Did you notice any physical symptoms that he was displaying during that initial interview?

A. Well, the most outstanding characteristic was the wild-eyed look, the amount of agitation, with pacing, being unable to sit still, breathing very rapidly and very deeply. There—during the time I was talking with him, there were no tremors. He was not trembling. He. . .

Q. Did you notice any saliva at the sides of his mouth?

A. Not that I recall.

Q. What did you do after you finished your (p. 2363) interview?

A. When you finished the interview, I went out and talked with Mr. Bayles, and talked to him a little more about my first encounter with Mr. Mauro.

I then talked with him about the need to treat Mr. Mauro at that point.

At that point I was very concerned about his mental state. I felt that he was acutely in need of medication, because of his mental state, and I informed Mr. Bayles of that, and told him I wanted to start treatment.

Mr. Bayles at that point told me that he wanted to wait, since he was new in the firm, he wanted to check with other members of the firm to see if that was all right, and I became quite upset with Mr. Bayles.

Eventually I talked with him, and on his promise that he would check immediately with someone else and get back to me, I acceded and said I would wait until I heard word, and then I went and talked to Norma Kaecker, the

jail nurse, to let her know that I, once I got approval, I did want him started on medication.

Q. And did you, in fact, start Mr. Mauro on medication?

A. I did the next day.

Q. What type of medication did you prescribe?

A. Medication is called Loxitane. Loxitane is (p. 2364) an antipsychotic medication that is specific for psychotic disorders.

Q. Is that a so-called psychotropic medication?

A. Yes, it is.

Q. What does the term, psychotropic, mean?

A. Psychotropic means medication that affects the mind. Psychotropic medications can include major tranquilizers such as Loxitane, other, other medications in that same category, Thorazine and Haldol and a bunch of others. Psychotropic also includes minor tranquilizers such as Valium; you can also include amphetamines. It's a very broad term.

Q. Is Loxitane utilized for treatment of seriously disturbed people?

A. It's utilized in people who are psychotic, so, yes, severely disturbed, but a certain type of severe disturbance.

Q. What dosage level did you prescribe? Do you recall?

A. Let me refer to my — I want to refer to the notes from Nurse Kaecker.

On the 24th, when we started medication, I asked that they give Mr. Mauro 25 milligrams in the morning and then 25 milligrams at night.

Later in the day, I called Norma back and asked her (p 2365) to increase the evening dose, because, well, excuse me, let me back up for a minute. I did not. I did not call her back. I — well, I had been to the jail the day after, on the 24th, to see Mr. Mauro, and it was based upon that interview that I asked to increase the dose.

Q. What is the usual dosage that you administer of this medication?

A. The usual dose will be dependent on the person's mental status. Someone who I feel has a mild problem with psychosis, such as somebody who is schizophrenic but is still functioning quite well, I may start off with as low as ten milligrams or 20 milligrams a day, depending on size.

Someone who is acutely psychotic, I will usually start off with anywhere from 25 to 75 milligrams.

Excuse me. The maximum dose that you can administer to someone in a 24 hour period is 225 milligrams.

Q. Did you come back to the jail in the week or so following and observe Mr. Mauro's behavior?

A. I saw Mr. Mauro on the 24th.

Q. Could you describe the way he presented on the 24th?

A. All right.

When I saw Mr. Mauro, he was in A-1, and I asked (p. 2366) the jailers to move him to A-4. When I walked in A-1, I saw he was sitting there, just staring ahead, and because of the way he looked, I felt extremely uncomfortable. I wanted him to be moved to A-4, which has a, one wall that is almost all glass. The purpose for that was so that the jailers could observe.

I did that because I was afraid for my own safety.

Mr. Mauro came in, sat down. The entire time that he was in there, he stared at the wall, did not acknowledge my presence at all, and was breathing extremely rapidly. The best way to describe him is looking explosive.

Because of that, I tried several, several things to get him to acknowledge my presence. Because of his condition, I did not want to go over and touch him, because when someone is in a state like that, they can, with no provocation, flare up and become physically aggressive, and when I realized that Mr. Mauro just continued to sit there, was not acknowledging my presence, and his general level of agitation, even though he was just sitting still, appeared to be increasing, he was breathing more rapidly, his muscles were getting tighter, I finally left. I explained to him I was going to leave, and then I cautioned the jailers, I asked them to move him back to A-1, but before doing that, I cautioned them to be (p. 2667) careful because I was very afraid that he was going to strike out and hurt someone.

Q. What is catatonic behavior?

A. Catatonic behavior is, it's a symptom. Quite often people will think of catatonia in reference to schizophenia, and if I may, let me just refer to—this is—the

book to which I am referring is called the DSM-III, or Diagnostic and Statistical Manual of Mental Disorders.

Q. Before we get going here, is this book generally recognized in the field of psychiatry as authoritative?

A. Yes. This contains the various diagnoses which we will, from which we will choose, and it describes various symptoms to reach diagnoses.

The Court: We'll take a stretch break.

All right.

Mr. Aspey:

Q. What is catatonic behavior, catatonia?

A. Okay. Catatonia is a symptom of — it can be of a variety of different problems. It's characterized by, well, to read from the DSM-III, it can be dominated by any of the following, catatonic stupor, which is a decrease in reactivity to the environment, or mutism.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA,

Plaintiff,

vs. NO. 10056

WILLIAM CARL MAURO,

Defendant.

Flagstaff, Arizona
January 31, 1984

BEFORE: HONORABLE RICHARD K. MANGUM, Judge.

—

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume 14

TRIAL

* * *

[DIRECT EXAMINATION RESUMED]

[By Mr. Aspey:]

(p. 2425) Q. And who furnished you these medical records in this matter?

[By Dr. Gerstenberger:]

A. I have been furnished medical records from both the County Attorney's Office and from you.

Q. And do you feel that these have been helpful?

A. Yes, they have.

Q. Now let's look back on these medical records that we have discussed here. Can you draw any conclusions from your review of these medical records?

Is there anything that sticks out in your mind after looking at them?

A. Okay. First of all, there are several things that stick in my mind. First of all, Mr. Mauro has demonstrated a history of recurrent psychotic behavior. The psychotic behavior has been characterized by a couple of things, first of all, catatonia, appearing in a catatonic state. It's been characterized by hallucinations in which he hears voices telling him to kill his family. It's also characterized by a rapid return to fairly normal functioning. All of the hospitalizations have been short. It's also characterized by a lack of understanding on Mr. Mauro's part, so that he doesn't accept that there is something wrong as soon as things are more back to normal. I would say this is a (p. 2426) recurrent pattern. At times he's been seen to not only have hallucinations and some delusional thinking, but also to have pressured speech, to have flight of ideas, and several records refer to some manic qualities, even though the diagnosis ended up being schizophrenic on several of the hospitalizations.

Q. Let's go back to the November 23rd encounter in Cell A-1. It's been several days now, and so I'd like to touch on that again.

Was Mr. Mauro exhibiting psychotic symptoms on that day?

A. Yes, he was.

Q. What types of symptoms was he displaying?

A. He was displaying hallucinations, delusional thinking. His thoughts were disjointed. He displayed ambivalence.

Q. What is ambivalence?

A. Ambivalence is, well, first of all, it's being unable to decide between two different, two different thoughts, going back and forth, such as if you are ambivalent about going someplace you decide I am going to go there, no, I'm not going to.

When ambivalence is present to a great degree, then it can be a characteristic of schizophrenia.

* * *

(p. 2429) Q. Okay. Going back to the November 23rd interview, you mention that he was ambivalent, had delusional thinking and was experiencing auditory hallucinations. Was there any other symptoms that you observed in your initial interview?

A. Difficulty in relating to me, and Mr. Bayles was with me, even though he wasn't interviewing. At times Mr. Mauro would stare off and it was difficult to get him to acknowledge questions being asked, so I would say that would be consistent with a psychotic process.

Q. Was Mr. Mauro experiencing these symptoms prior to his having been administered medication?

A. Yes, he was.

Q. And again, what medication did you order?

A. I ordered Loxitane. I did not order that till after I had seen Mr. Mauro the next day, at which time he was displaying other symptoms of psychosis, also prior to the medicine.

Q. All right. And what was he displaying on the 24th?

A. On the 24th, he totally refused to acknowledge my presence. He stared at the wall.

When I first tried to talk to him, he stared ahead, (p. 2430) and because of his posture, I felt uncomfortoble, so that's why he was moved to another room where they could observe me. And during that time his muscles were tensed. He was staring straight ahead. Again, wild-eyed is the best way to describe it, and breathing extremely rapidly.

The best—one word to describe it is explosive. He just appeared to be ready to explode any moment.

Q. So you didn't start the medication until that day, is that right?

A. That's correct.

Q. I'd like to ask you something, Doctor. Is it—well, do you have an opinion as to whether or not the behavior which he displayed in the jail in a three week period after his incarceration was symptomatic of his illness or possibly symptomatic of the medication he was receiving?

Mr. Adams: Excuse me, Your Honor, may we have that to a reasonable medical certainty?

The Court: It should be probability, not certainty.

Mr. Adams: Excuse me, probability.

Mr. Aspey: I will rephrase the question.

Q. Doctor, can you express an opinion here today based on your training and experience as a psychiatrist and your review of the jail records and your observations

(p. 2431) of Mr. Mauro in the jail, as to whether or not, and again, within a reasonable degree of medical probability, the symptoms that he was displaying in the jail in a three week period following his incarceration was symptomatic of his illness or merely a side effect of the medication that he was receiving?

A. I can express that opinion.

Q. What is that?

A. It's my opinion that it was due to his mental illness and not due to the side effects of the medication.

* * *

[By Mr. Aspey:]

(p. 2436) Q. Going back again to the November 23rd interview, I think you have described some of the things that he was saying last week. Could you go over that one more time? It's been four or five days. I think we need to highlight that again.

[By Dr. Gerstenberger:]

A. All right. Some of the quotes are—well, this was not a quote, but he told me he remembered his son screaming, told me, "they're all dead. I killed them all. I must be the devil. They told me not to turn back on Jesus. I damned myself."

He remembered trying to strangle his wife and she tried to stop him. Another quote is, "I must be the devil. The devil makes you do things. I don't think it's the devil. I've blasphemed the Holy Spirit."

He had difficulty remembering his name. He was never able to think of his middle name, which he went by at the

time. He remembered a wall blowing down. He wasn't sure when it was. He thought it was two weeks earlier, although it may have been longer than that.

When I asked here he lived, he said at the El Pueblo, which I found out later he was not living there then, and then he asked if he was at the El Pueblo at the (p. 2437) time. He said, "I remember voices, voices saying you have to kill them, kill them all. Did I kill them?"

And then when I asked how he slept, he said, "I didn't. Maybe I did."

Q. Is that ambivalence?

A. Yes, that is.

Q. What is telescoping time?

A. Telescoping time is a phenomena that occurs when someone is in a—it can happen when somebody is acutely psychotic. It can also happen to somebody who is delirious, where they will be unable to follow sequentially. They won't be able to say, when they are talking to you, they won't be able to say this is going on now, just before that, this happened, just before that, this happened. As they are talking to you, they will intermingle current events with past events, and so you can't really tell what's going on.

It's my opinion that this was going on in this interview, because Mr. Mauro couldn't remember when the wall blew down. He was sort of—he was having difficulty in sorting things out, just little bits of memory were sort of floating in so he was grabbing on to things that he could remember. He could remember the wall blowing down. He remembered trying to strangle his wife, even though his wife said that was not that day, it had (p. 2438) been one or two days earlier. He remembered his son screaming.

I, based on talking to him, I really don't know if that was that morning or if that had been the day before or when, so he was telescoping different events.

Q. Is that symptomatic of a psychotic episode?

A. Yes. Occasionally I'll see someone who has a chronic psychotic process who, when I try to get a history, will just keep telescoping things until finally you say when did that happen, they will say 1972, and they just go back and forth. You have to pin them down on every little thing, but that is part of the psychotic process.

The Court: We'll take a stretch break.

Mr. Aspey:

Q. Doctor Gerstenberger, I'd like to show you what's been marked as Defendant's Exhibit Number 172. I'll tell you that that's a tape of Mr. Mauro on the 23rd, which was taken by Don Bayles. Have you had occasion to listen to that tape?

A. Yes, I have.

Q. Is that—does that tape accurately demonstrate the way Mr. Mauro presented in Cell A-1 on November 23rd, 1982?

A. It—there are some parts of it that are (p. 2439) very similar. I qualify that from the standpoint that when I saw—I heard the tape, and this has refreshed my memory of some of the events, but during the time I saw Mr. Mauro, he was much more agitated than that. There was—at times he sounded as in the tape. Other times he would be much more agitated.

Q. And did you rely on the way Mr. Mauro presented that day in formulating your opinion in this case?

A. Yes.

Q. And in that regard, has this tape been helpful to you in helping you to formulate your opinion?

A. It's been helpful in refreshing my memory about how he presented.

Mr. Aspey: Your Honor, I'd like to offer Defendant's Exhibit Number 172 in evidence at this time.

Mr. Adams: Objection, lack of foundation.

The Court: Overruled.

Exhibit 172 is admitted.

* * *

[Direct Examination Resumed]

[By Mr. Aspey:]

(p. 2485) Q. Did his psychosis fluctuate during that roughly three week period of time?

[By Dr. Gerstenberger:]

A. Yes, it did. In fact, it's fluctuated during the day of November 23rd.

Q. Well, let's talk about that a little bit. You've reviewed all the witness statements from the K Mart people, haven't you?

A. Yes, I have.

Q. What do those indicate to you concerning his psychosis on that day?

A. They indicate that Mr. Mauro was, well, was psychotic. He would testify, or came in stating, "I killed the beast, I killed the devil, I killed my son."

I believe all of the—all of the witnesses there, if not all, close to all, have stated either, "I killed the beast," or "I killed the devil," in their statement; some of them also include, "I killed my son."

They substantiate someone who is very excited, is—feels very, almost as though he had done something really great.

Q. Doctor, is it possible for someone who is psychotic to go in and out, that's the only way I can describe it.

(p. 2486) A. That, that happens very frequently. In fact, I would say if it doesn't happen all the time, it happens close enough that it's as pure as ivory snow. Most of the time somebody goes psychotic they will fluctuate. They are not totally out of touch with reality the entire time. They will get a little more based in reality at some times, but they are never able to totally maintain in reality.

Q. In fact, we have discussed an example of this at prior hearings, haven't we, from your training?

A. Yes. We have.

Q. Could you—I know you always have a hard time remembering that example, but if you can, could you give that example to the jury?

A. All right, see if this is the example I think you are thinking of.

The best example I can think of for that was a person I had when I was working at the Rochester State Hospital in Minnesota. There was a person who had chronic schizophrenia and was chronically ill.

Q. What does chronic mean?

A. This is over a long period of time. This person was not going to get better. He was going to continually be ill. He had been hospitalized in state facilities for about 15 years at that point.

* * *

[By Mr. Aspey:]

(p. 2488) Q. Is it possible for someone who is psychotic to follow directions?

[By Dr. Gerstenberger:]

A. Very much so.

Q. For example, if I was a police officer and I asked someone who was psychotic to get in the back of a car, would that be consistent with someone who is psychotic?

A. It would. The only time that they wouldn't is if they started hearing voices saying this is one of them, they are going to hurt you, or was delusional about the police, but if the person is not delusional about the police, usually they would go ahead and cooperate on that.

Q. Would you expect that someone could, for example, turn around and be photographed, if he was psychotic?

A. Yes.

Q. Be fingerprinted?

A. Yes.

Q. On November 23rd, isn't it true that Mr. Mauro was able to hold it together at times and at other times he wasn't?

(p. 2489) A. Yes.

Q. Is it unusual, Doctor, for a patient who is psychotic at times to seem normal and yet at other times, quite bizarre?

A. Not at all. For example, in the hospital, if we have someone who is psychotic, quite often they can sit there and carry on a fairly good conversation with you until you start asking about something which touches on their delusional thinking or the hallucinations, and then they can start going into quite a bizarre story. So it's very possible to maintain what appears to be a coherent conversation at those paints.

Q. Doctor, both Linda Mauro and Daniel Mauro have told you that they felt Bill Mauro was crazy at the time of the offense, haven't they?

A. Yes.

Q. Is it difficult, Doctor, to come in after the fact in a Rule 11 evaluation and express an opinion as to what someone's mental condition was three or four months earlier?

A. It is difficult, it's much more difficult than being able to see the person at the time.

Q. Is it easier to express such an opinion when you have treated the individual prior to the offense?

A. Yes, it is.

* * *

(p. 2496) Q. Finally, Doctor, is it your opinion that Mr. Mauro was insane per the M'Naghten rule at the time of David's unfortunate death in this case?

A. Yes, it is my opinion that he was insane per M'Naghten.

Mr. Aspey: Your Honor, at this time I'd like to play the tape.

The Court: Since you are playing that from a pretty small unit, I don't know how well that broadcasts, you might play it into the mike.

Mr. Aspey: Yes, I will, Your Honor. It is difficult to understand, though.

I will play it at this time.

(The tape is played.)

* * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA,

Plaintiff,

vs. NO. 10056

WILLIAM CARL MAURO,

Defendant.

Flagstaff, Arizona
February 1, 1984

BEFORE: HONORABLE RICHARD K. MANGUM,
Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume 15

TRIAL

* * *

[CROSS-EXAMINATION RESUMED]

[By Mr. Adams]

(p. 2707) Q. Going to the tape—just a few questions— that Mr. Aspey played for you, what were you told about that? What did you understand that tape to be before it was played to you in January of 1984?

[By Dr. Gerstenberger]

A. It was my understanding that that was a tape that Mr. Don Bayles had made when he went in to talk with Mr. Mauro.

Q. And that was before you saw Mr. Mauro?

A. Yes.

Q. And Mr. Bayles was his attorney at that time?

A. Yes.

Q. And did you detect, Doctor, any sense of remorse or feeling of guilt from what you heard on that tape?

(p. 2708) A. From what I heard on that tape, I heard sort of a shock of did I kill someone.

Q. You heard no sense of—you got no sense that this person felt remorseful or sorry for what had happened?

A. No, I'd say that he felt sorry, but he was still trying to figure out what had happened.

Q. How did his behavior on the tape that was played here differ from what you had seen, what you saw shortly thereafter on that afternoon?

A. The—some of it was very similar, but in other parts during the time I met with Mr. Mauro, he was much more upset.

Q. Agitated, I think you said, on direct?

A. Yes. He was visibly upset, would get up and pace back and forth. At times he would sit there and just stare ahead or else put his hands up to his head.

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA,

Plaintiff,

vs. NO. 10056

WILLIAM CARL MAURO,

Defendant.

Flagstaff, Arizona

February 2, 1984

BEMORE: HONORABLE RICHARD K. MANGUM, Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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TRIAL

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The Court:

(p. 2961) The State has the burden of proving that Exhibits 39 and 40 should be admited in evidence, assuming that a proper foundation is laid, so I will give them the affirmative burden of arguing for their admission. We will recess at a quarter of 5:00.

You may make your argument.

Mr. Prost: Thank you, Your Honor.

Exhibit 39, if you will recall, if memory serves, is the conversation that took place between Linda Mauro and Carl Mauro at the Flagstaff Police Station on November 23, 1982, I believe at approximately 11:00 o'clock

in the morning, and there was—we took evidence on this point during the evidentiary hearing in late November and early December, that week that was set aside for that purpose, and I'd like to just refresh the Court's recollection, if I may, as to the facts.

Mrs. Mauro was brought to the Police Station at about 10:00, about 10:30 that morning, questioned. Following the questioning, she—Detective Manson, who was doing the questioning, she expressed the desire to see her husband. Detective Hanson stated on the stand that he (p. 2962) advised her against it, felt that he had to have authority from Byron Allen, his supervisor, the detective supervisor, in order to grant that request.

Detective Allen—he did so. Detective Allen, Sergeant Byron Allen said, well, I don't see anything wrong with it, but you're gonna have to be in there with them, and you better tape a tape recorder. I think that's a fair summary of his statement.

Both—Captain Latham also testified, Byron Allen testified, Frank Manson testified that the reason was security, Mr. Mauro, why the presence of another officer. To me, there is no, really no legal relevance to the fact that there was a tape recorder.

The issue is whether a police officer could be present, and I submit that in the interest of security, a man who had been arrested for a violent crime, with another family member wanting to see him, and it was over the objection of Frank Manson that this was permitted to be done. I think that cannot be emphasized enough.

Detective Manson, there was no use of Linda Mauro as an agent. There was no subterfuge here in the sense

that Detective Manson getting her to go in there and talk to him and I'll hide behind the door and record all this. He sat there. In evidence are photographs of the arrangement of the chairs. He sat there, three, four feet (p. 2963) away from the defendant with a tape recorder in plain view, and while his wife spoke to him.

There had to be a police officer present at all times to keep this man in custody. Captain Latham's office is not a secure area. There is a window in the office. There is a picture of it that's in evidence at the evidentiary hearing, and they had to—there was a fear that the man who they suspected had killed his son might turn on the mother or someone else and kill another, and that was the basic reason that the police officer was there.

When Detective Manson entered the room, Detective Trimble who had held him in custody, left.

Your Honor, we base our argument on two cases, fundamentally, which are, one case, in particular, an Arizona case, Narten, State versus Narten, 99 Ariz. 116, is directly on point. That case was later appealed to the Ninth Circuit of Appeals. Narten versus Eyman, 460 F.2d 184, and the case was affirmed and it was almost the identical situation. I cited this in my response, and I feel it so important I need to reemphasize the holding of the Ninth Circuit Court of Appeals.

The facts in that case were as follows, and I am citing from 460 F.2d at 191. An officer guarding appellant testified to certain incriminating statements (p. 2964) made by appellant and overheard by the officer during a conversation between appellant and his wife, Mrs. Narten.

The conversation took place February 22, 1963, in the Sheriff's Office at about 2:00 o'clock in the morning. The meeting was arranged at the request of Mrs. Narten, not at the insistence of the police, and the time was arranged for her convenience, since she worked late hours. There was no compulsion or interrogation by the police. There was no evidence of surreptitious eavesdropping. The officer was only present for security reasons, guarding appellant, who was charged with a capital offense. Appellant and his wife were fully aware of the officer's presence and proximity. Although he did not interrogate them, at times they asked, they each asked questions of him, meaning the officer. The officer overheard parts of their conversation when they raised their voices.

In view of these facts, the Arizona Supreme Court, relying on DeLeon versus Territory, and they give the cite, 9 Ariz. 161, held that the officer's testimony was properly admitted.

That should be 99 Ariz., not 9 Ariz. The conversation between appellant and his wife was not a privileged communication since they knew a third party, the officer, was present. Although the law renders the wife an incompetent witness, the third party could still (p. 2965) testify. We believe this holding to be correct and find no grounds to disturb it, and this is the real issue, because at this time there is no question that Mr. Mauro had invoked his right to remain silent and asked for an attorney. Moreover, since the incriminating statements were not deliberately elicited by the police and were not the result of secret interrogation in the absence of counsel,

we find no denial of the right to counsel under the principle of Massiah versus U.S., 377 201, and they cite the, several other Supreme Court cases.

The Court: What's the date of that case?

Mr. Prost: 1972. rehearing denied, June 13, 1972.

That principle was relied on just last summer in State versus Summerlin, a decision by the Arizona Supreme Court. They reaffirmed their position on this issue. The facts were a little different, but I think the principle's identical. It was a capital case. The defendant complained of the admission into evidence of a police officer's testimony as to a conversation between the defendant and his wife while he was in custody. Mr. Summerlin had, had been read his rights and was at the Police Station when the conversation took place. The difference in that case, the meeting was arranged at the defendant's request. Against the defendant's wishes the police remained in the room where the conversation took (p. 2966) place.

On appeal the defendant claimed that since he had requested that a private meeting, the conversation with his wife was privileged. The Court rejected this argument on the basis of the case I've just cited, State versus Narten, 99 Ariz. 116. which was affirmed by the Ninth Circuit, and the decision, the Arizona Supreme Court said as follows. Defendant Summerlin was warned by the police officers that he couldn't meet privately with his wife. Since the officer stood in the same room with defendant and his wife, defendant should have known he risked the officer's hearing all or part of his conversation. I've cited various other cases on Pages 30, 31 of my response.

I don't think I need to go any further than I have in view of the fact—

The Court: Don't those cases turn on the principle of waiver?

Mr. Prost: Some of them.

The Court: The defendant waived his right not to speak.

Mr. Prost: That is, I do not believe they do, Your Honor. Are you referring to the ones that I quoted you or the others?

The Court: I certainly am. I am referring to the ones you just talked about.

(p. 2967) Mr. Prost: Your Honor, the facts in Narten versus Eyman were almost identical to the facts—

The Court: Well, don't tell me about the facts. I know the facts. I'm talking to you about legal principles now.

Mr. Prost: Uh-huh.

The Court: It seems to me that these cases turn on the idea of waiver, the defendant knew the police were there and knew that he was going to be overheard and he chose to speak anyway.

Mr. Prost: That is correct, Your Honor, I agree that analysis.

The Court: That means waiver.

Mr. Prost: I agree.

The Court: To have waiver it has to be knowingly, intelligently and voluntarily done.

Mr. Prost: Right.

The Court: Don't we have a different problem when we are looking at the capacity for waiver in a person with a mental health problem?

Mr. Prost: Your Honor, we have heard testimony at the evidentiary hearing on this specific point. Doctor Gerstenberger was—I asked Doctor Gerstenberger about this very point. He testified—you will recall his testimony, he had this rating scale, I think zero, one, (p. 2968) two, three or zero, one, two, three, four or something like that, and his testimony, specific testimony was that while the defendant was at the Police Station, and I refer to this tape because we played for him, the day before he testified, we played for him this tape of Carl and Linda and asked him about it, and I asked him about it on the stand. His opinion was that that statement was voluntary as a psychiatrist. That was his testimony. On his scale, he rated it as a one. If, you know, for whatever that means, he said that—

The Court: Assuming arguendo that you are right on that, that would take care of one of the three requirements. For waiver it has to be knowingly, intelligently and voluntarily made. Assume it was voluntarily made. What about the knowingly and intelligently made?

Mr. Prost: Your Honor, I would just submit this was a waiver—the concept of waiver applies to—first, the concept of waiver only comes into play when you have an interrogation. There was no—that's the critical factor.

There was no interrogation of the defendant by the police. Detective Manson just sat there. He didn't—Linda Mauro went in that room over his objection, over his recommendation. He didn't tell her, well, be sure to ask him, he didn't tell her what to say, (p. 2969) what to ask. There was no interrogation. The threshold requirement is not even met before you get to waiver, you know.

The Court has listened to the tape. It was played for everyone in the courtroom, and let me submit to you, to Your Honor why we are offering this particular tape. We are offering this tape not to show evidence to connect him with the killing. I don't think that there is really any confession on there. We are offering this as evidence of his state of mind to rebut the inference that was made when the defendant called his own lawyer to testify and testified as to his state of mind.

Secondly, when he offered a tape recording of a privileged conversation between Don Bayles and himself at the county jail, we are offering this tape to, as direct evidence of the defendant's mental state, that he could appreciate the nature and quality of his acts, and this tape goes to the very heart of this case, the truth of this case is on that tape, and whether the defendant could know right from wrong, whether he could know what he was doing.

I think we would be in a different position, Your Honor, perhaps, if we had tried to use this tape in our case in chief, but at this point, the defendant himself has called his own attorney to the stand to testify as to (p. 2970) privileged communications and observations. He has placed in evidence a privileged communication between himself and Don Bayles.

The tape has been played for both psychiatrists. Both psychiatrists have considered it. The tape shows that—on the tape the jury could judge for themselves, was this man suffering from flight of ideas, was there pressured speech, was there distractibility, did he have an elevated mood, was there hyperactivity, was there any evidence of hallucinations or delusions. It goes to the very heart and soul of the diagnosis that's been rendered in the case, and I submit to Your Honor that it's extremely probative.

If the Court feels that some limiting instruction needs to be made, you are not to consider this as evidence of guilt, as far as that it's only offered as evidence of his mental state on the insanity question, I have no problem with that.

That is the only reason that we are offering the tape. We are not trying to offer the tape to try to prove that Carl Mauro committed the killing. It is strictly offered as evidence of his mental state on November 23, 1982, and I submit to you that Narten versus Eyman is directly on point. There's been a waiver during this trial by calling the defendant's own counsel, putting in (p. 2971) privileged conversations.

The Court: Well, Mr. Prost, I don't believe at all that one waiver waives everything.

Mr. Prost: Your Honor, I'm not arguing that.

The Court: It's his privilege as to that conversation with that conversation with that attorney, which he may waive; certainly doesn't mean that he then waives every other privilege he has for every other purpose.

Mr. Prost: Your Honor, I agree with that, and I'm not going to argue that point, but on the other hand, Your Honor will recall that you limited the scope of our cross examination on, for example, Bruce Griffen to the very things that he was testifying to. He wasn't permitted to, I believe, testify to—I don't even know if Bruce ever discussed the facts of the crime with the defendant, but we weren't permitted to go into that.

Your Honor, I will simply stand on the proposition that where a defendant makes voluntary statement in the presence of a police officer that's not the result of interrogation, there is no Miranda problem, there is no Sixth Amendment counsel problem.

The statements were volunteered. They were overheard by Detective Manson. This was not a ruse or subterfuge. Detective Manson was as far away from the defendant when the statements were made as I am from (p. 2972) Marilyn Taylor. He was in plain view, and, you know, I have cited case after case on that point, where a defendant volunteers statements, then the State is permitted to use those statements in evidence, and we have tried to mitigate or limit the effect of this by not trying to shoehorn this in our case in chief or anything like that.

If the insanity—we are simply offering it in rebuttal to the insanity defense to show the jury that there was a time when there was no flight of ideas and all these other criteria that have been testified to as alleged evidence of the defendant's alleged insanity.

Your Honor: I don't know the order that the Court wants to proceed. Perhaps we ought to complete our argument on this particular tape, and then move on to Exhibit 40.

The Court: I think that's better.

Mr. Aspey: Your Honor, thank you.

The Court: Mr. Aspey.

Mr. Aspey: You may recall the response. It's been a long time, but essentially, Your Honor, we set forth in our response the fact that Mr. Mauro had been advised of his Miranda rights and had very specifically told Detective Trimble that he did not wish to speak to anyone until he had consulted with an attorney.

(p. 2973) Since it's been so long since we had the evidentiary hearing I wanted to just read a few pages here, because I think it's real, real important.

This is an examination of Detective Allen. "And so the conversation with Linda and Bill took place after he told you or Billy that he didn't want to talk to you?

"That's correct.

"Certainly when you sent an officer in to listen to that conversation—

Answer. "Yes, sir, I did.

Question. "You, well, my question is, certainly when you sent an officer in there to listen to that conversation, you knew that it was possible that he might make incriminating statements?

Answer. "That's correct.

Question. "And obviously you wanted to record that conversation so as to have a record of those incriminating statements?

Answer. "That's correct."

Now Mr. Prost relies on a 1972 case, Ninth Circuit case, but, Your Honor, in 1980, the United States Supreme Court told us what interrogation means, in Rhode Island versus Innis, and they held specific, quote, "Interrogation refers not only to express questioning, but also to any words or actions on the part of the police (p. 2974) other than those normally attendant to arrest and custody that the police should know are reasonably likely to elicit an incriminating response. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation," and what I'm saying here is that Mr. Mauro had unequivocally told the officers that he didn't want to be interrogated, he wanted to see an attorney, and certainly when they brought Mrs. Mauro in and they had Frank Manson present and a tape recorder, the only concern on that officer's mind was not security as suggested by the State.

A very significant concern was to try and tape any incriminating statements, and I submit that that was a practice reasonably designed to elicit an incriminating response under Rhode Island versus Innis and it should not be allowed.

The Court: Are there incriminating statements in Exhibit 39?

Mr. Aspey: Yes, very much so, statements to the effect, you tried to stop me, whole line of responses to Mrs. Mauro like this, and I believe it's a significant violation of the Miranda rule, and on top of that, you know, going beyond Miranda, you know, I have argued all along that this man was, you know, psychotic under (p. 2975) Blackburn, and all—Dean said the statements were voluntary. I asked him, "What do you understand voluntary

to mean?" This is what he said. "Okay. My understanding of it is that he was making those, no one was coercing him."

That's a far different understanding than a knowing, voluntary, intelligent waiver, Your Honor. You know, I believe that this was a deception that was practiced by the Flagstaff Police Department. They went in there. They knew he had invoked his right to remain silent. They knew that if they brought his wife in there, they might get some incriminating statements.

In fact, that's just exactly what happened. You know, to ask a police officer if that was his purpose when he went in there is like asking the fox that got the chickens if that's what he intended to do. We are not going to get a candid response on that. But I think Detective Allen came about as close as you can get. He admitted to us when he went in there, one of the reasons they sent the officers in there with a tape recorder was to record any incriminating statements, and I just believe that it should be suppressed. Thank you.

The Court: Rebuttal?

Mr. Prost: Your Honor, the testimony was to record any statements. Whether the statements were recorded or (p. 2976) not, is not the issue. The presence—if there was a violation, the violation was created by the presence of the officer. Whether he recorded what was heard is not the point.

I do not have Rhode Island versus Innis in front of me, but we did cite it, and I remember the facts of that

case, and in that case the conversation, the statements of the defendant that were overheard by the police officers, the admissibility of those statements was affirmed on appeal by the U.S. Supreme Court as volunteered statements. They said that even though the defendant had invoked his right to remain silent and right to counsel, and I think he was awaiting trial or something, he can still volunteer incriminating statements and they are admissible in a court of law, and what happened in that case, as I recall the facts, there was a conversation between two police officers which elicited, in the presence of the defendant, and in the course of that conversation between the two police officers, the defendant made various incriminating statements. The Court held that the statements were admissible, that the conversations, that the conduc of the officers was appropriate and not, did not result in a violation of the Sixth Amendment right to counsel.

Here we don't have any conversation, interrogation (p. 2977) or questioning or ruse, which is the defendant's position, on the part of the police. They advised Linda Mauro not to go in there. They did not want her to go in there. That's why Frank Manson went to his supervisor to get permission. And I have cited cases where such conversations have been admitted when there was secretive conduct or a ruse, that sort of thing, when the admissibility of those statements were upheld. That was not the case here.

Your Honor, I think I've said enough, and we ask the Court to allow the admission of Exhibit 39.

The Court: We have run out of time this evening. We haven't even begun to argue the question concerning Exhibit 40. I will take the matter under advisement.

* * *

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA IN AND FOR
THE COUNTY OF COCONINO

THE STATE OF ARIZONA,

Plaintiff,

vs. NO. 10056

WILLIAM CARL MAURO,
Defendant.

Flagstaff, Arizona
February 3, 1984

BEFORE: HONORABLE RICHARD K. MANGUM,
Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume 17

TRIAL

(p. 2978) Proceedings in Open Court

February 3, 1984

8:40 o'clock a.m.

The Court: Thank you. Be seated, please.

I call court to order. Counsel and the defendant are present to argue certain matters of law outside the presence of the jury.

Yesterday we heard argument from both parties concerning whether Exhibit 39 should be suppressed.

Today I will hear argument concerning Exhibit 40. Again, I think the State is the proponent of the introduction of the exhibit, so I will give them the burden.

You may make your argument concerning that issue.

Mr. Prost: Thank you, Your Honor.

I would request, if it would be appropriate, to play, since I think the last time the Court has heard Exhibits 39 and 40 was at the evidentiary hearing held in November. May I at this time have Exhibits 39 and 40 played?

The Court: I don't need the information. I remember pretty well what's on them.

Mr. Prost: Okay. Very well, Your Honor.

Your Honor, before proceeding to Exhibit 40, I had (p. 2979) some further argument on Exhibit 39, if I may, concerning testimony.

The Court: You are insatiable. Why do you think you should have more argument? I could have ruled last night. I heard both parties fully. What is it you want to say this morning that you couldn't have said yesterday?

Mr. Prost: Well, Your Honor, there are certain citations to the record by Mr. Aspey concerning testimony of Byron Allen, and I would like to—I checked those citations out, and I would like to review that testimony with the Court, if I may.

The Court: I'm sure if you do that, Mr. Aspey will want to have some more time to rebut what you are saying.

Is that correct?

Mr. Aspey: Yes.

The Court: Go ahead.

Mr. Prost: Thank you, Your Honor.

And I'm quoting from the testimony on November 30th, Page 338, testimony of Byron Allen.

Question. "Okay. Why did you want Detective Manson in the room?"

Answer. "First of all, for Mrs. Mauro's safety, since we had the defendant incarcerated at the time for a crime of homicide. I did not wish to leave his wife in the room with him alone. I still was in the dark (p. 2980) somewhat. I didn't know if the two of them were involved together in the crime.

"I feared for her safety, first of all, and secondly, maybe they would try to concoct stories and get their stories together, and I didn't know if Frank was totally finished talking to her at the time or if he needed to re-interview her; also, the escape factor, if the two of them were in the room by themselves, she may assist him in exiting the window. I took a lot of things into consideration."

"Is that fairly standard procedure for the, whenever you have a defendant in custody at the Police Station, or a suspect in custody, to always station an officer present with the defendant?"

"We follow that pretty much so, especially if it's a homicide, an armed robbery, you know, a major crime."

"You take extra precautions when a person has been accused of violent crimes such as homicide?"

"Yes, sir."

"And in your mind, did you have reason to believe that this particular defendant, William Carl Mauro, was dangerous and to be feared?"

"I felt so, yes, sir."

"In your opinion did you feel that extra precautions were in order as far as he was concerned?"

(p. 2981) "Yes, sir."

And in response, in regard to that conversation, Doctor Gerstenberger, in response to redirect by Mr. Aspey—

The Court: I don't follow where you are, you are talking about Detective Allen, and now you have switched to Doctor Gerstenberger.

Mr. Prost: I was unable to cite you to—Mr. Aspey referred to, cited the record in regard to Dean Gerstenberger, and there was a quote from him in regard to the specific conversation set forth in Exhibit 39, Page 31, if I may.

Line 20, Question. "As I understand it then, however, the taped interview at the Police Station between Bill and his wife, the taped interview where he was advised of his Miranda rights, he was holding it together a little bit better at that time?"

"That's correct."

"And you placed those about a one on your scale?"

"Yes."

And on Page 18, my question, "In your opinion as a psychitrist, do you feel that all of these statements that I have just asked you about should be considered by the jury when they consider this case?"

Answer. "It's my belief that they should. My own (p. 2982) feeling is I think the jury should be allowed access to the information so they can evaluate it themselves."

The Court: Did the jury, in fact, hear about that? That is to say, did Doctor Gerstenberger tell them he had used that in making his evaluation?

Mr. Prost: Well, Your Honor, we did not go into that simply because the Court had not ruled on the matter, and it would have created grounds for a mistrial to go into it with him, and that is why we did not go into it with him.

In addition, I didn't—I cited the Court to a case of the Arizona Supreme Court, where they cited the Narten versus Eyman case, and I neglected to give you the citation, and if I may, Your Honor, I'd just like to—I will just present a copy to the Court. I am not aware of the Pacific citation.

The Court: Have you given this authority to Mr. Aspey?

Mr. Aspey: I haven't received a copy, Your Honor.

Mr. Prost: Your Honor, it was cited in my Motion to Suppress. I will be happy to provide a copy to counsel.

Your Honor, as to Exhibit 40, the taped conversation wherein Detective Trimble—

The Court: Just a moment. I'm not ready to talk (p. 2983) about Exhibit 40. We haven't finished Exhibit 39.

Mr. Prost: Yes, Your Honor.

The Court: Mr. Aspey, do you have anything else to say about Exhibit 39?

Mr. Aspey: Yes, sir.

Your Honor, at the evidentiary hearing I asked Frank Manson whether or not Linda Mauro had been advised of her Miranda rights. Frank—the questioning and answering went as follows.

"Frank, when we broke I believe I was asking you questions concerning whether or not you advised Linda Mauro of her Miranda rights, and as I recall, you indicated that you did on two or three occasions."

Answer. "Yes, sir."

"And that was because you believed she was a suspect?"

Answer. "Yeah, I didn't know if she would be or wouldn't be at that time so I just thought I'd cover that right out front."

Going on, "I didn't know if either one was working together, and I wanted to just preserve their conversation, whatever statements were made by her or Mauro himself."

"You say you didn't know if they were working together?"

(p. 2984) Answer. "Yes, in other words, I thought it would be improper for them to get together and, let's say him tell her what to tell the police or her tell him what to tell the police or make a story together."

"Frank, certainly you were aware that during the conversation either Linda or my client may have given an incriminating statement?"

Answer. "Yes."

"And obviously one of the purposes of your tape recording the interview was to take down any such statements?"

Answer. "Yes, sir."

And then with regard to the issue on Doctor Gerstenberger, Your Honor, as to whether or not the statements were a product of his psychotic thinking that day.

"Certainly, however, you would agree with me, wouldn't you, Doctor, that those statements were a product of his phychotic thinking?"

"I would have to say that anything he said during the day would be tinged with, you know, because of the psychosis. I won't say anything because I remember hearing the statement which I would refer to as a one, or a couple of statements on the tapes, but any or almost any statements he made at that time would be influenced by his (p. 2985) psychotic thinking."

Thank you.

The Court: You may now make your argument concerning Exhibit 40.

Mr. Prost: Your Honor, Exhibit 40, as I have stated, as I recall, is the taped conversation between Detective Trimble — I believe Captain Latham is also present in the beginning — at the Flagstaff Police Department on November 23rd, 1982, wherein he was advised that he was under arrest for homicide. He acknowledges that. He was advised of his Miranda rights. He says he understands them, and he says I'm not going to answer any questions without right to an attorney, I believe, as I recall the conversation from the transcript.

The Court: First, let me ask what probative value that has.

Mr. Prost: Your Honor, the probative value — the reason we would offer this would be as evidence of the man's mental state.

You will recall that detective, not detective, Bruce Griffen testified that the, his testimony in effect was that this man didn't know who we were or if we were there to represent him, didn't care. He didn't need lawyer. He needed a doctor. I believe that was Bruce Griffen's testimony as a result of his encounter with the (p. 2986) defendant at the jail several hours later.

This tape, on this tape the defendant shows exactly the opposite mental state. It goes in direct rebuttal to the testimony of Mr. Griffen on that point. There he is, obviously. There is no pressured speech. There is no flight of ideas. He's extremely aware of what's going on. He is definitely aware that he needs to see a lawyer and that he's in trouble.

And we would be offering that tape for that purpose, as evidence of his mental state, in particular, in view of Doctor Gerstenberegr's testimony concerning the various artifacts and diagnostic criteria for the manic, the psychotic episode that he testified to.

I cited numerous authorities that the mere fact that a person may be under the influence, or tinged, to use Doctor Gerstenberger's word, with psychosis is no ground whatsoever to preclude him, the admissibility on the grounds of voluntariness of such statements.

In particular, I cited the federal case of Gibbs versus Warden of Georgia State Penitentiary, wherein the Court held at 450 F. Supp. 244, there is no per se ruling holding inadmissible confessions given by individuals suffering severe psychotic conditions.

Now Doctor Gerstenberger testified that when these tapes were made, they were anything but severe. They (p. 2987) were, at most, tinged. They were — he was much more in touch with reality, and I submit to the Court that the case law, and I have cited that case, is State versus Lujan, Allred versus State, several cases in our response on that particular point.

Now I realize that in the ordinary case it is certainly inappropriate to make, for the State to affirmatively offer any evidence whatsoever of the defendant's request for an attorney, implication of Miranda rights and, in fact, any reference to that is potential grounds for just an automatic mistrial. In the ordinary case.

This is not an ordinary case. This is a case of insanity, where the defendant's mental state is in direct issue, in particular, his mental state on November 23, 1982.

Doctor Gerstenberger has relied heavily upon his opinion or observation of the defendant at the jail on that date of his arrest, claiming that at least at that point that he didn't know where he was, what he was doing and so forth. He testified to how the defendant fit the various criteria for a person in a psychotic condition.

I cited the Court to, in the response, to the case of Sulie versus Duckworth, a decision by the Seventh Circuit United States Court of Appeals, which I would

(p. 2988) submit is one of the leading cases in this area wherein they held as follows: Where the State has the burden of proving sanity beyond a reasonable doubt, the burden some might think virtually impossible to carry in any case of criminal, which implies aberrant behavior, evidence of a defendant's lucidity at or near the time of the crime may therefore be important in preventing erroneous acquittals on grounds of insanity, a legitimate and important social goal. That preventive effect must be weighed against the burden, which we have said is indirect, on the exercise of the Fifth Amendment right against compulsory self incrimination.

And the Court goes on to say, and I'm skipping a paragraph, I'm quoting also from 689 F.2d at Page 131, where evidence that the defendant asked for a lawyer is used to prove not sanity, but, for example, guilt, its probative value is slight. It is not true that only a guilty person would want to have a lawyer present when he was being questioned by the police.

But here it was great. In this particular case the defendant was, as I recall the facts of the case, had been held by the police for a period of some 30 hours, and during the course of that I think some 30 hours after his arrest he asked for a lawyer.

During his trial, he raised the defense of (p. 2989) insanity. The State was permitted to show in rebuttal to that defense that at that point in the interrogation he had asked for a lawyer.

Now here, of course, when the conversation takes place between Detective Trimble and the defendant, there

was no interrogation going on. He simply asked for a lawyer. He was being read his rights. He acknowledged them, said he understood them, I am not going to say anything without rights of an attorney.

This testimony would be offered solely on that point. If the evidence is allowed, we would — it could and should be expressly limited to that effect, and the jury should be instructed that it is only, that they may only consider it for that purpose, and we will not, certainly not argue that it should be considered for any other purpose, simply evidence of his state of mind in rebuttal to the statements by Bruce Griffen on the witness stand, and Dean Gerstenberger, when asked about the, when played the tape recording of the conversation between the defendant and Don Bayles, which took place the same day.

Thank you, Your Honor.

The Court: I have a concern with this exhibit, namely, that it is being offered only for the purpose of showing that at the time in question, namely, when the defendant was at the Police Station, he was pretty well in (p. 2990) touch with reality. He was able to communicate with the police and function fairly well there.

It seems to me we already have a lot of evidence of that kind in the record. He allowed himself to be photographed and allowed himself to be fingerprinted. He sat where he was told to sit, so on.

Why do you want to have this dangerous kind of exhibit that raises constitutional questions come in if it is cumulative to testimony that you already have in which is risk free?

Mr. Prost: Your Honor, if I had to choose between the two tapes, I would have to agree that Exhibit 40 is certainly more risky, would be a more risky ruling for the Court to allow this evidence in versus Exhibit 39, which in my view, is virtually risk free in view of the case law that I have cited.

But we would offer it because it is a tape recording. It rebuts evidence that the defendant himself has offered when he offered the testimony of his own lawyer.

It shows — it's in rebuttal only. I think if Bruce Griffen had not taken the stand that we would not be able to make the argument, as strong an argument as I feel that we can make now.

It is direct evidence of the defendant's mental (p. 2991) state which the, I feel the jury should be allowed to consider, and I think there is a case, State versus Grilz, the Arizona Supreme Court, Mr. Grilz raised the defense of insanity, and there was a partial, and I'll give the Court the cite, 66—666 P.2d 1059, and I am just quoting from Page 1062. There was an argument to whether a particular tape should come into play, and I want to say at the outset the case is not entirely on point because it's a tape of a, I believe of Linda Grilz, the victim in the case, they simply state that the State—we agree with the State, however, that the facts and the timeframe established by the entire tape is relevant to the issue of sanity, shows voices of the victim, as well as the appellant, the defendant, and the tape was allowed in in its entirety even though it would be the type of evidence that might tend to arouse the jurors' emotions.

The part of the tape with the appellant's voice established a point in time after the victim was shot that indicates appellant's state of mind at the time. This evidence of the appellant's state of mind minutes after the shooting is very probative of his state of mind at the time of the shooting, and that was in response to the defense of insanity.

That's not direct, obviously, not right on point, and I was quoting from Page 1062 of that particular (p. 2992) opinion.

But to return to the Court's—I simply submit that the jury should be allowed to hear this tape recorded evidence themselves, let them judge. They have been told part of the story. Let them hear the entire story that we have.

If—but I do have to agree with the Court that as to Exhibit 40, it is a more, more fraught with potential dangers than Exhibit 39.

The Court: Mr. Aspey?

Mr. Aspey: Yes, sir.

Your Honor, in Doyle versus Ohio, which is a United States Supreme Court case, 1976, the United States Supreme Court held that it's reversible error to ask a defendant who has asserted an alibi defense on cross examination why he remained silent at the time of his arrest after he had invoked his Miranda rights. That's really the lead case in the area.

In U.S. versus Hale, 1975 case, the United States Supreme Court held that post Miranda silence cannot

be utilized to impeach one or cross examine one after you have invoked your right to remain silent.

I tried to find a case on point. I think I found one. It just came down. It's State versus Burwick, this was an opinion handed down by the Florida Supreme Court on (p. 2993) December 8th, 1983, and it dealt with the exact issue that we are dealing with here today.

In that case the defendant raised the insanity defense, and the State indicated that they wanted to utilize the defendant's post arrest silence and his request for counsel in its rebuttal case, and they argued, Your Honor, in that case, as does Mr. Prost in this case, that it was relevant on the issue of mental condition. The Florida Supreme Court disagreed, relying on U.S. v. Hale and Doyle v. Ohio, and held it is fundamentally unfair for the State to lure Burwick into remaining silent, then impeach the man with his very same silence. To permit the State to benefit from the fruits on its own deceptions, violates the due process clause of the 14th Amendment.

In that case, Your Honor, the State argued quite forcefully that it was probative on the issue of mental health at the time of the crime, and the Supreme Court said, look, while it may be probative, it may be relevant, it's unconstitutional, and they—when they reversed the conviction.

I think the case is directly on point, and I think it would be fundamental error to allow that tape to come in. Thank you.

The Court: Mr. Prost.

Mr. Prost: Your Honor, I will rest on the (p. 2994) statements in my response that was filed. I don't think any further argument is necessary.

The Court: My rulings are as follows. As to Exhibit 39, which is the tape recording made by a police officer of a conversation between the defendant and his wife shortly after his arrest, I know what the law of Arizona is because we have the Narten case, which was decided on remarkably similar facts. To go beyond the law of Arizona into the federal body of law, I would have to try to guess what that law is.

My first inclination when considering the admissibility of this exhibit was to avoid trouble by guessing that the federal law would be that the tape should be suppressed and that it would be prudent to avoid trouble by suppressing it.

However, upon reflection, I am going to change my position. Instead, I am going to abide by the known law of Arizona, the Narten case, and allow the exhibit to be admitted.

I do this for the following reasons. First, I think Exhibit 39 is highly relevant and extremely probative. The state of the defendant's mind at the time of the alleged crimes is a major issue in the case. The entire sanity defense is built on it. Therefore, information about the defendant's state of mind near the (p. 2995) time of the alleged events is very helpful and very revealing. Witnesses have said so, and that certainly is my belief.

The jury has heard a tape offered by the defendant himself, which was taken by one of his attorneys shortly

after he was incarcerated. Obviously even defense counsel thinks that tapes showing how the defendant spoke and how he reacted and related to people speaking to him was of importance to show his state of mind.

The tape that we are now looking at, Exhibit 39, was made before the tape made by attorney Bayles. It is even fresher and closer to the event. I have heard the tape and I know what is on it.

In think one of the important things about Exhibit 39 is that it is firsthand information. We have heard a substantial quantity of secondhand information from a number of witnesses about such things as whether the defendant was excited, whether he was in touch with reality and so on. By hearing the tape, the jury will directly experience how the defendant sounded, what his voice quality was and hear things such as pauses and inflections which they would not get otherwise, and they will get a good idea of how well he was in touch with reality.

I think Exhibit 39 is important in at least three (p. 2996) key ways. First, it does show the defendant's state of mind shortly after the alleged crimes. Second, it shows his wife's state of mind then. The defendant has made the wife's behavior an issue and has suggested that she may be partially or wholly responsible for the alleged crimes. I think that hearing her will help the jury decide whether such claims are well founded. Finally, the defendant makes inculpatory remarks on that tape indicating that he knew what he had done and that he knew it was wrong. A jury could even take some of his remarks on that tape as an admission of guilt, and that is as directly probative as it is possible to get.

The situation that existed when Exhibit 39 was made was that the defendant had been arrested and taken into custody. He was at the Police Station. He had been given his Miranda warnings, and I find that everything up to that point passes muster under the Miranda test. The defendant elected to say nothing to the police unless counsel was present. The police thereafter did not question him. Mrs. Mauro appeared at the Police Station shortly thereafter and insisted that she speak with her husband. The police counseled her not to, but she was adamant about that. They finally yielded to her insistent demands. The Police Station lacked a secure interview room. The police justifiably appeared for Mrs. Mauro's (p. 2997) safety, and they were also concerned about security, both in terms of whether Mr. and Mrs. Mauro might cook up a lie or swap statements with each other that shouldn't have been allowed, and whether some escape attempt might have been made, or whether there might have been an attempt to smuggle in a weapon. They really had no idea what to expect along those lines.

Therefore, they clearly told both Mr. and Mrs. Mauro that they could speak together only if an officer were present in the room to observe and hear what was going on.

The officer who was present produced a tape recorder and told the couple that their conversation would be recorded and put that tape recorder down on the desk in plain sight and taped their conversation, so they had knowledge that that was going on.

I find that this procedure was not a ruse, nor a subterfuge by the police. They did not create this situation as an indirect means of avoiding the dictates of Miranda.

The defendant, with knowledge that the police were listening, could have chosen not to speak to his wife. Instead, he chose to speak. The officer and the tape recorder were only a couple of feet away from him and they were in full view, so I find that his choosing to speak to (p. 2998) his wife under those conditions was voluntary.

There has been a question in the Court's mind about whether the defendant's choosing to speak was also knowing and intelligent. If I were dealing with a person whose mental competence were not in question, I would have unhesitatingly concluded that the defendant's choice to speak was knowing and intelligent. In fact, even in this case where the defendant's mental competence is in question, I find beyond doubt that his choosing to speak was knowing. Certainly he understood the situation. The tape itself tells the listener that Mr. Mauro knew exactly what was going on, so I think in my mind the inquiry is narrowed to whether his choosing to speak to his wife was intelligent.

As to that issue, I think the testimony of the defendant's own witness, Doctor Gerstenberger, is helpful. He said both in front of the jury and at an evidentiary hearing that the defendant rapidly fluctuated that day from being in touch with reality to being out of touch. The question of how much in touch with reality he was at times during that day is a key question for the jury to answer. This tape will show that he was well in touch with reality at the time it was made. He was making intelligent choices at that time, and I find that his choosing to speak to his wife was intelligent in the (p. 2999) meaning of the law.

Therefore, by his conduct he waived his Miranda rights not to speak without counsel present by knowingly, intelligently and voluntarily discussing matters connected with the case with his wife in the presence of a police officer.

The tape will also show that he very consciously put limits on the conversation, telling his wife to shut up, that he wasn't going to talk without an attorney and so on, which reinforces my belief that he did have good control of his mind at the time of the taping.

In think, therefore, that Exhibit 39 does pass the Miranda test concerning suppression of evidence. I find also that it passes the tests imposed by Rule 403 of the rules of evidence.

As to Exhibit 40, I am going to exclude it on Rule 403 grounds. I think it is cumulative, especially since I am allowing Exhibit 39, which does contain statements by the defendant to the effect that he is not gong to talk without a lawyer.

* * *

(p. 3011) FRANK MANSON,

called as a witness herein, having been previously sworn by the Clerk, retakes the stand and testifies further as follows:

DIRECT EXAMINATION

By Mr. Prost:

Q. I will remind you, Detective Manson, you are still under oath.

On November 23, 1982, you had occasion to observe the defendant in the presence of his wife, Linda Mauro, is that correct?

A. Yes.

Q. And could you explain the circumstances that—well, first of all, did—could you explain the circumstances that led up to that event?

A. Of my interview with Mrs. Mauro?

Q. No. No, you have testified to that.

Did you—were you in a position to—did you tape record a conversation between Mrs. Mauro and Mr. Mauro at the Police Station on that date?

A. Yes, I did.

Q. About what time did that take place?

A. Around 11:00 in the morning.

Q. I'll hand you what's been marked as Exhibit 39 and ask you to examine that item and identify it for (p. 3012) the record, if you would.

A. Plaintiff's Exhibit Number 39 is a tape recording I made while in the presence of the defendant and his wife on November 23rd, 1982.

Mr. Prost: Your Honor, we would offer Exhibit 39.

Mr. Aspey: I'd renew my earlier objection, Your Honor.

The Court: Exhibit 39 is admitted.

Mr. Prost:

Q. Did this conversation take place in any particular part of the Police Station?

A. Captain Latham's office.

Q. And can you describe that office, where it is?

A. It's an office that has a door and a window, has some bookshelves, a sofa, some chairs like the one I'm sitting on, and a desk.

Q. Captain Latham's desk?

A. Yes.

Q. And who was present during the course of this conversation?

A. The defendant, his wife and myself.

Q. And the defendant was in custody at that time?

A. Yes, he was.

(p. 3013) Q. Did—in a moment I'm going to ask you to play the tape for the jury.

I first of all kind of want to set the scene. I want to ask you where everyone was located during the course of this conversation in Captain Latham's office.

A. I was sitting three or four feet away from the defendant with my legs crossed, and I held a tape recorder in my right hand on top of my knee, and Mrs. Mauro was, she did not sit, she stood and walked somewhat in back of the defendant.

Q. And did this conversation take place before or after you had interviewed Mrs. Mauro on that date?

A. After my first interview.

Q. Now Captain Latham's office has a door, is that correct?

A. Yes, sir.

Q. And was the door left open or closed during this conversation?

A. It was ajar. It wasn't all the way open. It was open about an inch.

Q. Is there a secretary, a typewriter. stationed outside of the captain's office?

A. Yes, just outside the door.

Q. The reason I ask you that, are there other sounds to be heard during the course of this conversation (p. 3014) coming from that area of the Police Station?

A. Yes, you can hear her typewriter and you can also hear the intercom paging other officers.

Q. And whose voices do you hear on the tape?

A. You hear Mrs. Mauro, the defendant and my, and myself.

Q. Is there a voice at the very beginning of the tape?

A. Yes, that's Detective Sergeant Allen's voice.

Mr. Prost: Your Honor, at this time I'd request permission to play the tape for the jury.

The Court: You may.

Mr. Prost: Thank you, Your Honor.

Your Honor, while the detective is getting ready, I need to have a Bench conference about one matter.

(Proceedings held at the Bench out of the hearing of the jury:

Mr. Prost: Your Honor, I have—this is a copy of the transcript that was used at the evidentiary hearing. I have

instructed Detective Manson not to play the tape in its entirety, but to stop at the point that I have indicated, and not play this portion.

Mr. Aspey: Certainly I have no objection.

The Court: All right. We will have him stop then at the place where you have indicated.

(p. 3015) Mr. Prost: And we need to make some provision. I don't know exactly how to do it, but to—I'd prefer to have him wait and delete that from the case.

The Court: I think the way to do it would be to make a duplicate tape that stops at that point. We don't want to erase the original.

Mr. Prost: That's correct, Your Honor. Very well.)

Proceedings in Open Court

The Witness: There is the tape of the defendant and his wife while I was present on the date of his arrest.

(The tape is played.)

Mr. Prost: No further questions.

The Court: You may cross examine.

CROSS EXAMINATION

By Mr. Aspey:

Q. Detective Manson, prior to the time that you taped that conversation, did you advise Mrs. Mauro of her Miranda rights?

A. Yes, I did.

Q. And was that because you felt she might be a (p. 3016) possible suspect?

A. I didn't know what her involvement would be.

Q. Certainly she was a possible suspect at that time?

A. Anything was possible at that time. I had considered that.

Mr. Aspey: That's all the questions I have.

• • •

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

Richard K. Mangum, Judge,
Division 2

Marilyn Taylor,
Court Reporter

Date: February 3, 1984

Jo Wycoff, Clerk
Marleah Edgar, Deputy Clerk

MINUTE ENTRY

THE STATE OF ARIZONA,

Plaintiff,

vs.

Case No. 10056

WILLIAM CARL MAURO,

Defendant.

ACTION: Trial—17th Day

APPEARANCES: Michael G. Prost and Charles D. Adams, Deputy County Attorneys, appearing on behalf of the State. The Defendant is present with counsel, Frederick M. Aspey.

Counsel and parties to the action are present in the Courtroom at 8:40 o'clock a.m.

Outside the presence of the jury, counsel continue argument as to the admissibility of Exhibit Nos. 39 and 40.

Having heard argument of counsel, the Court finds Exhibit No. 39 is highly relevant and extremely probative as to the Defendant's state of mind near the time of the crime. Therefore;

The Court further finds that Exhibit No. 39 does pass the M'Naghten [sic] test as to the suppression of evidence and shall be admitted in evidence and heard by the jury.

IT IS ORDERED that Exhibit No. 40 shall be excluded as being cumulative under Rule 403.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA,

Plaintiff,

vs. NO. 10056

WILLIAM CARL MAURO,

Defendant.

Flagstaff, Arizona
February 9, 1984

BEFORE: HONORABLE RICHARD K. MANGUM, Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume 20

TRIAL

[STATE'S CLOSING ARGUMENT]

* * *

[By Mr. Prost:]

(p. 3602) Doctor Gerstenberger has testified at length that the defendant's mental state fluctuated in and out.

Whenever Mr. Adams would ask him a question about the facts of the case, which is, after all, why we are here, Doctor Gerstenberger would say, well, he was better grounded in reality.

You will recall that he made that, gave that testimony this very morning on surrebuttal when he was asked about Exhibit 39. That is the taped conversation between Mr.

Mauro and his wife at the Flagstaff Police (p. 3603) Department on November 23, 1982, at approximately 11:00 a.m., about half an hour or so or an hour after his arrest.

I ask you to play that. You will have that tape available, as well as the tape offered by the defendant between Mr. Bayles and his client, Mr. Mauro.

I ask you to play that tape and examine Doctor Gerstenberger's testimony in light of the statements and the state of mind that's shown on that tape.

Wouldn't you expect Linda Mauro, the first thing, she walks in, to say, why did you do this thing? How could you do this?

Instead she says, we could have put David in the hospital. We should have put him in the hospital. Carl's response, "you tried to stop it."

Please, please, I don't know what to do. We should have put David in the hospital. I don't know what we're gonna do. We should have went for help. We should have went for help.

Carl's response, "you tried as best you could to stop it."

She starts to say something, I—

"Shut up."

No, we should—

"Shut up . . ."

(p. 3604) We should have taken him to a mental hospital or something. What do we do?

"Shut up . . ."

Detective Manson asked, "do you know a reverend," and he is addressing Mrs. Mauro, "a reverend or a priest or someone you can talk to, take care of David?

Ann: "No."

Mrs. Mauro. "Don't answer any questions till you get rights of an attorney before you find out what's going on. You tried to stop me as best you can. What are you gonna do, kill me? You tried as best you can to stop me."

I'll say he was better grounded in reality. He had been caught and he knew it, and he knew what he was facing. He knew what he was looking at.

* * *

[STATE'S REBUTTAL ARGUMENT]

* * *

[By Mr. Adams:]

(p. 3697) I think that it's important — and I'm almost done — that Doctor Cleary — I think it enhances his credibility when he says knowing that Doctor Gerstenberger saw the defendant on November 23 and has a different opinion than him, he acknowledges that, you know, I'm sure he would have liked to have been there, too, and seen the defendant himself, but there are some things that I think (p. 3698) kind of weigh against that ..otion.

One is there's a tape of the defendant and his wife talking in the Flagstaff Police Department about 11:00 o'clock in the morning before Doctor Gerstenberger even saw the defendant, and as Mr. Prost said, when Doctor Gerstenberger ultimately did see the defendant, it was later in the day, and it was after he's been seen by a defense attorney, and, of course, Doctor Gerstenberger had seen the defendant in February of '82.

* * *

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

STATE OF ARIZONA,
Appellee,

v.

WILLIAM CARL MAURO,
Appellant.

Supreme Court
No. 6329
Coconino County

Superior Court
No. 10056
(Filed February 25, 1986)

Appeal from the Superior Court of Coconino County
The Honorable Richard K. Mangum, Judge
REVERSED AND REMANDED

Robert K. Corbin
The Attorney General
By William J. Schafer III
and Diane Hienton
Assistant Attorneys General — Phoenix
Attorneys for Appellee

Ratner & Walsh
By Kathleen Walsh — Flagstaff
Attorneys for Appellant

HAYS, Justice

Appellant, William Carl Mauro, was convicted of one count of first degree murder, A.R.S. § 13-1105, and one count of child abuse, A.R.S. 13-3623. He was sentenced to death for the murder conviction and to a term of 28 years for the child abuse conviction. The sentences were

to run consecutively. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and -4035.

The facts from the record follow. On November 23, 1982, Mauro and his family were eating breakfast when appellant's seven-year-old son David began crying and screaming. David was in the bathroom wheer he had been imprisoned for seevral days by his father. Mauro told his wife that he would make the boy be quiet. Mauro went into the bathroom and forced a rolled child's sock and two cloths down the boy's throat, thus suffocating the child. Mauro then went to a bedroom and returned with a suitcase in which he placed the child's body. As he left the family trailer with the suitcase, he told his wife to "pray."

After leaving the trailer, Malro was observed carrying the suitcase through the residential neighborhood surrounding his home. Despite it being a very cold morning, appellant was wearing neither a coat nor shoes. When he reached an empty field, Mauro buried the suitcase under logs in a woodpile.

About one and one-half hours after he was seen near the field, Mauro appeared at a K-Mart store. There he asked employees to call the police. Flagstaff police received a call from an employee who said a man had entered the store claiming to have killed something. The employee described the man as being very excited and delirious. Several witnesses heard Mauro claim to have killed the devil and to have put him in a suitcase, but that he was still moving. Later, Mauro told these same witnesses that he had killed the devil, his son. Once again

the K-Mart employee called the police to add this admission. He stated that Mauro was "out of it" and "really afraid."

When the police arrived, Mauro continued to claim that he had killed his son who was possessed by the devil. He insisted on showing police where the suitcase was concealed. Mauro told the officers that he'd take the "rap," and that "I know I'll get executed or go to the penitentiary, but I had to do it." He helped officers locate the suitcase and was then taken to the police station. Because of Mauro's behavior and the small size of the suitcase, officers were unwilling to open the suitcase until a bomb expert could examine it. When the bomb expert discovered the body, Mauro was taken back to the scene and formally arrested.

An autopsy of David's body revealed that he had died of asphyxiation. Although he was seven years old, David weighed only 38 pounds and was 46.2 inches tall. He had numerous bruises and abrasions over his body, some of which were recent. Additionally, marks on his ankles were consistant with having been bound, and he showed signs of malnutrition. Finally, the wounds on David's body indicated a struggle shortly before death, including strong resistance to the sock being placed in his mouth.

Mauro's sole defense at trial was insanity. As a result of this court's decision in State v. Coconino County Superior Court, Division II (Mauro), 139 Ariz. 422, 678 P.2d 1386 (1984), the State retained the burden of proof on this issue. Testimony at trial revealed that Mauro had a history of mental problems, going back at least as far as 1970. He had been hospitalized at least ten (10) times

during those years, including once in Flagstaff in February 1982, nine months before the killing. His mother also had a history of mental problems. Specifically, she had been diagnosed as a manic depressive (now known as bipolar affective disorder).

At the request of his court-appointed attorney, Mauro was seen by his Flagstaff psychiatrist, Dr. Dean Gerstenberger, on the day of the killing. Later, Dr. Gerstenberger was appointed by the court to evaluate appellant's competency to stand trial and his legal sanity at the time of the killing. At trial, the doctor testified that Mauro had slipped into a psychotic state some days prior to the killing and had remained there for some weeks after the episode. Dr. Gerstenberger further testified that appellant was legally insane under the M'Naghten rule when he killed David. He based this determination primarily on testimony regarding Mauro's behavior prior to the murders. Specifically, testimony revealed that Mauro spoke of space creatures outside the trailer which planned to take his family's souls; that he paced the floor all night, "pleading the blood"; that his wife's sister had come in spirit to take over his wife's soul; and that he had repeatedly rolled around on the floor. In light of this evidence, Dr. Gerstenberger diagnosed appellant as suffering from a bipolar affective disorder.

Dr. Michael Cleary, a Phoenix psychiatrist nominated by the State, was also appointed by the court to evaluate appellant. He testified that Mauro had a compulsive personality disorder with paranoid features and was not insane under the M'Naghten test. On cross-examination, the doctor stated that he had some doubt about appellant's sanity at the time of the killing, but he acknowledged that appellant was in a disturbed state of mind

and was probably hallucinating during the two or three days prior to the killing. However, the doctor stated that the evidence of concealment of the body shows that Mauro knew right from wrong.

I. SEVERANCE

Prior to trial, appellant moved to sever the premeditated murder count in the indictment from the child-abuse count. A decision to grant denial of a motion to sever is within the sound discretion of the trial court and will be reversed only if that discretion is abused. State v. Cruz, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). In deciding whether to grant the severance, the trial court weighs the possible prejudice to the defendant against the interests of judicial economy. *Id.*

First, appellant raises as error the court's refusal to sever the two counts in order to permit a fair determination of guilt under Rule 13.4(a), Rules of Criminal Procedure, 17 A.R.S. Appellant argues that joinder of the counts allowed the state to overcome the marital privilege statute which gives one spouse the right to keep the other spouse off the stand as a witness. A.R.S. § 13-4062(1). Specifically, appellant contends that the child-abuse count permitted spousal testimony to be introduced into evidence because the marital privilege is unavailable in a criminal proceeding "in which child neglect, dependency, abuse or abandonment is in issue." A.R.S. § 13-3620(d). The trial court denied appellant's motion to sever, stating that the killing of a child from the marriage is so hostile and antagonistic to the purposes of the marriage that the

privilege should not apply. We agree with the trial court that even in the absence of the child-abuse count, the privilege would not apply.

The matrimonial privilege is unavailable when a spouse kills a child of the marriage. State v. Ulin, 113 Ariz. 141, 145, 548 P.2d 19, 23 (1976); State v. Figueroa, 122 Ariz. 190, 192, 593 P.2d 940, 942 (App. 1979). Evidence was presented at trial revealing that both spouses engaged in acts of child abuse; however, only one parent committed the homicide. It is therefore unnecessary for us to address the argument as to whether the same result would occur when both parents are codefendants to the homicide. The trial court did not abuse its discretion.

Second, appellant claims that the child-abuse count was actually a lesser-included offense of the murder charge and, therefore, should not have been included in the indictment. The issue of lesser-included offense was not advanced at the trial level and therefore defendant has waived the issue. State v. Thomas, 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981).

Finally, appellant claims that he was entitled to severance as a matter of right under Rule 13.4(b), Rules of Criminal Procedure, 17 A.R.S. This argument is entirely without merit. Entitlement to severance by right is only available to offenses joined under Rule 13.3(a)(1). *See* Rule 13.4(b). The two counts were joined under the "same conduct" provision of Rule 13.3(a)(2) and not the "same or similar character" provision of Rule 13.3(a)(1). The indictment was amended to allege that both the homicide and the child abuse involved the use of a dangerous instrument: "one white child's sock with two stripes and

one white cloth measuring approximately 24 inches by 24 inches." (This cloth was referred to at trial as a diaper). The prosecution chose to charge appellant with only the actions of abuse that ultimately led to the death of David. Thus, since both charges were based on the "same conduct," the severance request was properly denied.

II. VOIR DIRE

Appellant contends that there was an insufficient voir dire concerning the insanity defense and various religious issues in the case. Prior to the voir dire, both the prosecution and defense submitted extensive lists of voir dire questions to the trial judge. The court refused to ask any of the questions submitted by the defense on religion. From almost fifty questions submitted by both the prosecution and defense on insanity, the judge asked only one. He added another of his own to the list.

The scope of voir dire is left to the sound discretion of the trial court. State v. Tims, 143 Ariz. 196, 198, 693 P.2d 333, 335 (1985). Absent a clear abuse of discretion, limitation of voir dire will not be adjudged error on appeal. *Id.* Rule 18.5(d) provides that the trial court "shall conduct the voir dire examination, putting to the jurors all appropriate questions requested by counsel." *See* State v. Chaney, 141 Ariz. 295, 303-04, 686 P.2d 1265, 1273-74 (1984).

In State v. Chaney, *supra,* we upheld a voir dire on an insanity issue which also consisted of only two questions. 141 Ariz. at 303, 686 P.2d at 1273. The first question in *Chaney* differed from that in this case. In *Chaney,* the court asked:

> Are any of you acquainted with anyone who has been treated for having a mental disorder, a neurological disorder, or a brain disorder?

Id. Both the defense and the prosecution submitted questions that paralleled this inquiry but they were not asked. We find the questions to be direct and relevant. However, because we dispose of the case on other grounds, we need not decide if it was an abuse of discretion for the trial court to refuse to ask them.

Although we need not decide if the court's voir dire on insanity was sufficient to avoid error, we believe that, in the future, trial courts should broaden the scope of their inquiry to extend beyond the minimum due process demands of "putting to jurors all appropriate questions requested by counsel." *See* State v. Chaney, 141 Ariz. at 303-04, 686 P.2d at 1273-74 (quoting Rule 18.5(d)).

Appellant also urges that the court's refusal to ask any of the proposed questions concerning religious issues amounted to prejudicial error. This court has recently held that the religious faith, affiliation and beliefs of a prospective juror are a proper subject of inquiry on voir dire in certain cases. State v. Via, 146 Ariz. 108, 117-118, 704 P.2d 238, 247-48 (1985); *see* 47 Am. Jur. 2d *Jury* § 283. Specifically, in analyzing a case, we must consider whether there is a nexus between the prejudice feared and an issue in the case. State v. Skaggs, 120 Ariz. 467, 586 P.2d 1282 (1978).

The record in this case reveals the court's concern about questioning jurors on religion as it related to the case. Further, the court apparently found defense counsel unable to articulate exactly what prejudice was feared:

The court:

. . . .

It's so vague. The case involves religious beliefs which you may or may not espouse. What sacrament, using water instead of wine? They would have no idea what you are talking about. Would the fact that this case concerns certain religious beliefs affect your ability to serve as a fair and impartial juror in this matter? If I were on that panel and you asked me that question, I wouldn't have the foggiest idea what I was being asked or how I could fairly respond.

. . . .

You might think about it some more and try to give me a question I can use, but these are improper and I won't ask them. I think they are unfair and improper.

Appellant alleges he was prejudiced by the court's refusal to ask the questions on religion. However, the court did not refuse to voir dire the jury on religion; it refused only to ask those questions which amounted to argument. In State v. McMurtrey, 136 Ariz. 93, 98-99, 664 P.2d 637, 642-43, *cert. denied*, 464 U.S. 858, 104 S. Ct. 180 (1983), this court held that it is not an abuse of discretion to refuse to ask questions that are argumentative.

Further, questions as to the religious beliefs and associations of veniremen are improper unless they are directed at specific prejudice. *See* State v. Via, 146 Ariz. at 118, 704 P.2d at 248. In the instant case, appellant's questions apparently were pointed at generalized fears concerning witchcraft and satanism. For example, defense counsel stated:

If the testimony comes out that my client was practicing witchcraft and satanism and we have a prospective juror on there that has feelings against that and

> goes into the jury room and convicts because of his view concerning those types of practices, I think we have a problem.

In reviewing the proposed questions, the trial court concluded that counsel had not sufficiently drafted the questions so that a juror could understand them. Rather, the court found them both vague and unfair. We agree and therefore find it was not an abuse of discretion to reject them.

III. FIFTH AMENDMENT CLAIMS

Appellant asserts that the admission of a tape-recorded conversation between himself and his wife violated his state and federal rights not to incriminate himself. U.S. Const. amend. V, XIV; Ariz. Const. art. 2, § 10. We agree and reverse on this issue.

After the discovery of the body, appellant was driven by police officers back to the field by the K-Mart. Detective Allen formally arrested appellant and advised him of his Miranda rights. Allen then asked appellant if he understood those rights and appellant replied that he did. When appellant was transported to the police station, he was once again advised of his Miranda rights at 10:45 a.m. As that time, appellant told the officers that he did not wish to make any statements without the presence of an attorney. That conversation was recorded but not admitted into evidence at the trial.

While appellant was being held in the captain's office, Mrs. Mauro was being questioned in another room. During that questioning, Mrs. Mauro told Detective Manson that her husband had a history of mental illness. Further,

she related accounts of various acts of discipline that might constitute child abuse. Mrs. Mauro detailed appellant's behavior prior to and after the homicide, including claims that he saw spacemen. At the end of the questioning, she requested that she be able to talk with her husband.

At around 11:00 a.m. Detective Manson approached Detective Allen and discussed Mrs. Mauro's request to speak to her husband. Manson told him that he didn't think it was a very good idea to allow the two to meet. Allen disagreed with Manson and allowed the visit. He directed Manson to be present when the conversation took place and to tape-record it. Allen testified that he wanted Manson present for security and because at that time he "still was in the dark somewhat." He "didn't know if the two of them were involved together in the crime." Therefore, he feared they might concoct stories or get their stories together.

Both detectives testified at pretrial hearings that they were aware that appellant might make incriminating statements. The defense asked Detective Allen:

> Q. . . . certainly when you sent an officer in there to listen to that conversation, you knew that it was possible that he might make incriminating statements?
>
> A. That's correct.
>
> Q. And obviously, you wanted to record that conversation so as to have a record of those incriminating statements?
>
> A. That's correct.

Later, Detective Manson was asked substantially the same questions:

Q. Frank, certainly you were aware that during the conversation either Linda or my client may have given an incriminating statement?

A. Yes.

Q. And obviously one of the purposes of your tape recording the interview was to take down any such statements?

A. Yes, sir.

Although the detective sat three or four feet from appellant with the tape recorder in plain view, appellant was never told the conversation would be taped. The taped conversation was brief:

. . .

Mrs. Mauro: Please—please, I don't know what to do. We should have put David in the hospital. Please—I don't know what we're going to do. We should have went for help—we should have went for help.

Appellant: You tried as best you could to stop it.

Mrs. Mauro: I—

Appellant: Shut up.

Mrs. Mauro: —taken him to a mental hospital or something. What'll we do?

Appellant: Shut up.

Det. Manson: Do you know a reverend or a priest or someone you can talk to—take care of David?

Mrs. Mauro: No.

Appellant: Don't answer questions until you get rights of attorney before you find out what's going on.

You tried to stop me as best you can. What are you going to do, kill me? You tried the best you can to stop me.

Mrs. Mauro: I don't—We don't—I don't have money.

Appellant: There's a public attorney.

Mrs. Mauro: I don't know.

Appellant: There's a public attorney. Why don't you just be quiet.

Mrs. Mauro: I don't have any money to bury him. I don't have any money. All I got is enough money for the rent for the children and that's it.

Det. Manson: Did you want to talk to your husband any more?

Mrs. Mauro: No. I can't talk to him.

Appellant: Then don't talk to me—get out.

Mrs. Mauro: I don't know what to do. O.K.

The trial court found that: 1) the conversation was voluntary; 2) the police did not initiate the conversation; and 3) the tape was highly probative of appellant's sanity or insanity at the time of the crime. Both psychiatrists used this tape in appellant's evaluation.

The right to counsel under the fifth amendment is a protection of the privelege against self-incrimination. United States v. Gouveia, — U.S. —, —, 104 S. Ct. 2292, 2298 n.5 (1984). If a person subjected to custodial interrogation invokes his Miranda rights, the interrogation must cease. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85 (1981); State v. Finehout, 136 Ariz. 226, 229, 665 P.2d 570, 573 (1983).

The state contends that the tape-recorded conversation does not constitute a violation of appellant's rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). The cases the State relies upon involve conversation between defendants and their spouses. We disagree that the present case is controlled by these cases. In the Narten cases, State v. Narten, 99 Ariz. 116, 407 P.2d 81 (1965), *cert. denied*, 384 U.S. 1008, 86 S. Ct. 1985 (1966), and Narten v. Eyman, 460 F.2d 184 (9th Cir. 1969), a husband and wife conversation took place in a sheriff's office. An officer was placed nearby to guard the defendant. There was no evidence of any intent to surreptitiously eavesdrop; in fact, the officer was at such a distance that heard only parts of the conversation. Although this conversation took place after the sixth amendment right to counsel attached, the officer who accidentally overheard the conversation was able to testify. There was no indication that this officer or the state used this conversation as a device to accumulate incriminating evidence.

In State v. Summerlin, 138 Ariz. 426, 675 P.2d 686 (1984), a defendant requested that he be able to speak to his wife. The police told him that an officer would have to be present. The record shows no attempt to surreptitiously eavesdrop. Once again, the guarding officer who overheard part of the conversation was able to testify. *Summerlin* only addresses the issue of anti-martial fact privilege and not the right of counsel.

Unlike the Narten cases and *Summerlin*, this is not a case where an officer accidentally overhears a conversation. Rather, here we have illicit custodial interrogation. At the time of the tape recording at issue, appellant

was under arrest and being detained at a police station. There is no doubt that this constituted a custodial setting. However, besides being in a custodial setting, the conversation must constitute "interrogation."

Interrogation includes a "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 1690 (1980). "The focus in ascertaining whether particular police conduct amounts to interrogation, then, is not on the form of the words used, but the intent of the police officers and the perceptions of the suspect." State v. Finehout, 136 Ariz. at 230, 665 P.2d at 574. An incriminating response is any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial. Rhode Island v. Innis, 446 U.S. at 301 n.5, 100 S. Ct. at 1690 n.5.

The intent of the detectives is clear from their own testimony. They both knew that if the conversation took place, incriminating statements were likely to be made. With that in mind, they decided to take in a tape recorder, sit near appellant and his wife and allow the conversation to commence.

Since the intent of the detectives is so clear, we need not address appellant's perceptions. Whether the police knew that appellant was unusually disoriented or upset might have been an important factor in this case had the State's intent not been so unambiguous. *See id.*, 446 U.S. at 302-03, 100 S. Ct. at 1690 (suspect's particular susceptibility to the police appeal and whether the police knew that appellant was unusually disoriented or upset are

factors to be examined in determining the perceptions of a suspect). We find, therefore, that in allowing the conversation to commence, the police did indirectly what they could not do indirectly—interrogate appellant.

Because this problem may arise again, we find it necessary to explain the right of a suspect who has invoked his right to silence. In doing so, we believe that language in a recent United States Supreme Court opinion on the right to counsel under the sixth amendment is equally applicable here:

> [The right to counsel] is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. [Citation omitted.] However, *knowing exploitation* by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity.

Maine v. Moulton, — U.S. —, 106 S. Ct. 447, 487 (1985) (emphasis added).

Although appellant's sixth amendment right to counsel had not attached at the time of the conversation, clearly the state could no longer interrogate appellant directly. Equally, the police may not circumvent appellant's right to silence by "exploiting" an opportunity and do indirectly what they could not do directly. Since the police in this instance controlled not only whether the conversation took place, but also the placement of the officer in the room, we cannot condone the use of this tape at trial.

The tape may not be admissible at trial; however, the doctors can use this tape in their Rule 11 evaluations. In State v. Mitchell, 106 Ariz. 492, 497, 478 P.2d 517, 522

(1970), we allowed an officer to give an opinion as to a defendant's sanity even though that opinion was based partly on a conversation with the defendant which had been suppressed by the trial court. Further, Rule 703, Arizona Rules of Evidence, A.R.S. 17A, specifically provides that facts or data usually relied upon by experts in forming an opinion need not be admissible in evidence.

As for presenting this evidence to the jury to formulate the basis of an opinion as to appellant's sanity, we believe the practice set forth by the United States Supreme Court is instructive. In Wainwright v. Greenfield, — U.S. —, 106 S. Ct. 634 (1986), the Court held that it is violative of the due process clause to use a defendant's post-arrest, post-Miranda warnings silence as evidence of sanity. The court interpreted silence to mean "not only muteness" but also "the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Id.* at 640 n.13. In other words, the state cannot use the words a defendant uses to request an attorney as evidence of sanity. However, the state may, through carefully framed questions that avoid any mention of the defendant's exercise of his constitutional rights to remain silent and to consult with counsel, present evidence that after his arrest, defendant's behavior appeared rational. Likewise, we believe that the state can present evidence that appellant was able to talk rationally after his arrest; however, they cannot make specific reference to this conversation.[1]

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[1] Parts of the tape-recorded conversation probably violated appellant's due process rights under the fourteenth amendment.

(Continued on following page)

IV. EVIDENTIARY ISSUES

Appellant has raised the admission of various items of evidence and testimony as constituting fundamental errors. Since we have decided to reverse this case on other grounds, we will discuss only those evidentiary issues which are likely to re-occur on retrial.

A. *Inflammatory Photographs*

Appellant argues that the trial court committed reversible error by admitting several inflammatory photographs of the victim. He claims that the prejudicial effect of these photographs outweighed their probative value. After holding an evidentiary hearing on the issue, the trial court excluded most of the photographs. However, the court did allow some of the photographs into evidence. These included pictures of the child's body in the suitcase, pictures of the body showing bruises and other marks of abuse, and autopsy pictures of the child with rags in his mouth. There was also a photograph of the child's internal organs showing the placement of the sock in the victim's throat, and the presence of wounds on the victim's lips.

Inflammatory photographs may be admitted if they are relevant and if their probative value outweighs the danger of unfair prejudice. State v. Bracy, 145 Ariz. 520, 533, 703

(Continued from previous page)

See Wainwright v. Greenfield, — U.S. at —, 106 S. Ct. at 639-40 (it is fundamentally unfair for the State to promise in the Miranda warnings that silence will not be used as a penalty, and then to unfairly "trick" him by using as evidence the words of his response at trial). However, since we are disposing of the entire conversation, we do not have to do a piecemeal analysis of it.

P.2d 464, 477 (1985), *cert. denied,* — U.S. —, — S. Ct. — (Jan. 27, 1986). The decision to admit these photographs will not be disturbed on appeal absent a clear abuse of discretion. *Id.*

A trial court's decision to admit photographs is based on the purpose behind the offer. *Id.* Furthermore, even though defense counsel may wish to stipulate to the photographs' contents so as to avoid their use, we cannot compel the state "to try its case in a sterile setting." State v. Chapple, 135 Ariz. 281, 289-90, 660 P.2d 1208, 1216-17 (1983).

In this case, the trial court found that although defense counsel was willing to stipulate to the victim's identity and the method of death, he was not willing to stipulate to premeditation. Premeditation, however, was the basis for the court admitting the photographs. For example, the trial court found that the picture of the body in the suitcase showed "how much control over his actions the defendant had at the times in question." It showed what could not be adequately described by other means. The same is true for the pictures showing signs of child abuse. Additionally, the pictures showing wounds on the victim's lips and the placement of the rags in his throat were admitted to show premeditation and to clearly refute any potential suggestion by the defense that Mrs. Mauro killed the child.[2] Although

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[2] The photograph of the placement of the sock and cloths in the throat was admitted for two purposes: to show premeditation and to refute any suggestion that the wife did the killing. On retrial, unless the defense is clearly raised that Mrs. Mauro committed the homicide and there is evidence that this photograph supports the proposition that no female could have committed the crime, we do not believe the photograph can be admitted to prove Mrs. Mauro did not kill the child. However, this photograph may be admissible on retrial solely to prove premeditation.

the photographs were inflammatory in varying degrees, we hold that they were not unfairly prejudicial and, therefore, the trial court did not abuse its discretion in admitting them. *See* State v. Bracy, *supra*. These photographs supported the state's theory of the case that the killing was premeditated and the climax of a history of abuse. We find no error in admitting inflammatory photographs when issues such as premeditation are not stipulated. *See* State v. Bracy, 145 Ariz. at 534, 703 P.2d at 478.

B. *Rule 11 Evaluation*

Appellant raised as error testimony concerning two statements he made prior to and during his Rule 11 mental evaluation. The trial court appointed Dr. Cleary to evaluate appellant's competency to stand trial and his mental status at the time of the offense. First, Dr. Cleary testified that appellant refused to see him on his second visit and asked that counsel be present during the evaluation. Further, Dr. Cleary emphasized that this request for counsel was unusual: "it is a big deal. It's the first time it's happened in 1,000 examinations." Earlier, the court had granted appellant's request that counsel be present during the subsequent evaluation. Second, Dr. Cleary testified that at the beginning of the interview, appellant stated that he "felt like a sitting duck." Appellant argues that the first statement was an impermissible comment on his right to counsel and the second was a violation of Rule 11.7(b), Arizona Rules of Criminal Procedure, 17 A.R.S.

The psychiatric evaluation is a "critical stage" of a proceeding and appellant has a right to counsel in formulating his approach to the examination. Estelle v. Smith, 451 U.S. 454, 470, 101 S. Ct. 1866, 1877 (1981). However, it

appears there is no constitutional right to have an attorney present during a court-ordered psychiatric examination itself. *See id.* at n.14.

In this case, however, the trial court permitted appellant to have counsel participate in the Rule 11 evaluation. Since we have reversed this case on other grounds, we do not need to reach the ultimate issue of whether the doctor's comment on appellant's request for counsel constituted fundamental error. However, on remand we direct the trial court to restrict the use of this evidence in accordance with the due process analysis of Wainwright v. Greenfield, *supra.* Since the trial court allowed appellant's counsel to be present, and the right to have counsel present at the evaluation is an unsettled question, it seems fundamentally unfair to later use that request as evidence of sanity. However, the jury should be allowed to be told that appellant was unwilling to fully cooperate with Dr. Cleary.

The second comment concerning appellant's feeling like a "sitting duck" is challenged as a violation of Rule 11.7 (b)(1) regarding privileged statements. This rule states:

> No statement of the defendant obtained under these provisions, or evidence resulting therefrom, concerning the events which form the basis of the charges against him shall be admissible at the trial of guilt or innocence, or at any subsequent proceeding to determine guilt or innocence, without his consent.

The state argues that this was a nontestimonial "verbal act" and therefore not covered by the privilege of Rule 11.7.

Appellant's state of mind at the time of the examination is not a statement "concerning the events which form the basis of the charges." Rather, this statement is probative of appellant's psychological attitude going into the

evaluation. We agree, therefore, that its use does not constitute error. However, we believe the use of any statements made by a defendant during such an examination should be strictly avoided. If the exact statement is so important that the prosecution would like to use it during trial, then it is apparently incriminating. Since this rule is to overcome the problem of forced self-incrimination, no statements made during the evaluation should be admitted.

In light of our decision today, it is unnecessary to consider appellant's other issues on appeal. Because appellant's conversation with his wife was improperly used at trial, we reverse the convictions for first degree murder and child abuse and the sentences imposed are vacated. Accordingly, this matter is remanded to the trial court for proceedings consistent with this opinion.

CONCURRING:
WILLIAM A. HOLOHAN
Chief Justice
JAMES DUKE CAMERON
Justice

JACK D. H. HAYS, Justice
FRANK X. GORDON, JR.
Vice Chief Justice
STANLEY G. FELDMAN
Justice

Supreme Court, U.S.
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No. 85-2121

In The
Supreme Court of the United States
October Term, 1985

STATE OF ARIZONA,
Petitioner,

vs.

WILLIAM CARL MAURO,
Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF FOR PETITIONER

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

JOHN VERKAMP
Coconino County Attorney

JACK ROBERTS
GEORGIA B. ELLEXSON*
Assistant Attorneys General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 255-4686

Attorneys for PETITIONER

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Did a Fifth or Six Amendment violation occur when, in answer to a request from respondent's wife, after respondent stated he would not make a statement without a lawyer present but before he was charged or afforded a lawyer, the police allowed them to talk in front of an officer who openly recorded the conversation and then, in rebuttal at trial, the state introduced these recorded statements to counter respondent's claim of insanity that was based, in part, on his conduct later that same day?

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STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court which petitioner asks this Court to review was entered on February 25, 1986. The Arizona Supreme Court denied petitioner's motion for rehearing on April 15, 1986. Petitioner sought a writ of certiorari on June 13, 1986. This Court granted the petition on October 6, 1986. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

The pertinent part of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

———o———

STATEMENT OF THE CASE

On November 23, 1982, William Carl Mauro asphyxiated his seven-year-old son, David, by forcing a rolled-up sock and two cloth diapers deep into the child's throat and mouth. Mauro went to the bathroom to quiet David after the boy began crying. Mauro had imprisoned David for several days, often locking him in a cabinet under the sink. Mauro told David to "shut up, shut up." He did not answer when his wife went to the closed bathroom door to ask him to leave David alone. [R.T. of Jan. 10, 1984 (Trial) Vol. 4 at 567-68, 595, 601-03; R.T. of Jan. 12, 1984 (Trial) Vol. 6 at 1014-17, 1071.]

After he murdered David, Mauro took a small suitcase to the bathroom and stuffed David's body into it. He carried the suitcase to an empty field and buried it beneath logs. Mauro then walked to a near-by K-Mart store, asked employees to call the police, and told them that he had killed his son, that he had killed the devil. When police arrived. Mauro told them about the killing, and directed them to the body.

On the way to the station, Sergeant Allen advised Mauro of the *Miranda*[1] rights, but did not question him.

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1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Mauro responded that he understood. (J.A. at 68-69.) At the Flagstaff Police Department, Captain Latham and Detective Trimble, unaware that Mauro had received *Miranda* warnings, readvised him of those rights. (J.A. at 77.) Mauro said he did not want to talk to police without an attorney. When he said that, all questioning ceased. (J.A. at 81-82, 93, 98-99, 102-03.) Mauro remained in Captain Latham's office to facilitate the collection of physical evidence from him. (J.A. at 113-14.) A guard remained with Mauro because there were no secure rooms at that location. (J.A. at 72-73, 96-97.)

Mauro's wife, Linda, called police to inform them about the disappearance of Mauro and their son. She learned that Mauro had murdered their son and that he was under arrest. Police brought her to the station for an interview. (J.A. at 70-72.)

After Detective Manson questioned her, Mrs. Mauro wanted to speak to her husband. (J.A. at 112.) Because Manson felt she was "upset enough," he tried to dissuade her, telling her that he did not think it was a good idea.[2] (J.A. at 112.) But she insisted and Detective Manson told her he would check with his supervisor, Sergeant Allen. Allen agreed to Mrs. Mauro's request. (J.A. at

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2. Detective Manson testified:

> She said, I want to talk to Carl, and I said, I don't know why, why make it worse, you've already learned that your son's dead. You don't have to have anything to do with him if you don't want to.
>
> She says, no, I want to talk to Carl, and I said, I don't think it's a good idea, you know, why go through the emotional trauma. It's bad enough. Let's just leave it alone.
>
> She says, no, I want to talk to him, and it was at that point that I said, well, if it's okay with my supervisor, we'll go ahead and do it, so I contacted Sergeant Allen.

(J.A. at 112.)

74, 112.) He told Manson not to leave the two alone, and suggested that Manson tape record the meeting. (J.A. at 74-75.) Allen explained his reasons for having Manson present: (1) concern for Mrs. Mauro's safety; (2) ignorance about the extent of Mrs. Mauro's involvement; (3) the possibility that the two might concoct stories; and (4) the potential for an escape attempt. (J.A. at 75-76.) Sergeant Allen did not know what Linda Mauro had told Manson, and he considered her a possible suspect.

Allen had no reason to believe that Mauro might have mental problems when he acquiesced in Mrs. Mauro's request to see her husband.[3] (J.A. at 85-86.) No one asked or told Mrs. Mauro to question Mauro or act on behalf of the police. (J.A. at 116.)

Captain Latham overheard the conversation between Manson and Allen and concurred that safety was the primary purpose for police presence at the meeting between Mauro and his wife. (J.A. at 101.) Manson explained that he taped the brief conversation to preserve it. (J.A.

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3. Sergeant Allen explained it in the following manner:

> Mr. Mauro had been advised of his rights. He stated he understood them. He stated he wished an attorney, not to me, but to Detective Trimble and Captain Latham, so he was not going to be asked any questions.
>
> Mrs. Mauro was very shaken. She didn't know what she was going to do. She didn't have money. She needed to talk to her husband, try to find out what he wanted her to do, and so that was the purpose of allowing her to speak to Mr. Mauro, so that she could be self-assured and get any questions answered that she wished.
>
> It's not like we were having her go in and talk to him and when she left we were going to go back in and then try to interview him, because he had already wished an attorney. We could not interrogate him.

(J.A. at 81-82.)

at 137.) Before she saw Mauro, Detective Manson informed Linda Mauro that he would be present with a tape recorder. She agreed. (J.A. at 118-19.) He turned it on before entering the room. *(Id.)* The conversation between Mauro and his wife was brief. Seated 3-4 feet from Mauro, Manson held the tape recorder in his right hand, resting it on his knee. (*Id.;* J.A. at 221-24.)

In the conversation,[4] Mauro told his wife not to answer questions, to get an attorney, that a public attorney was

---

4. The conversation is set out in the opinion of the Arizona Supreme Court as follows:

. . .

MRS. MAURO: Please—please, I don't know what to do. We should have put David in the hospital;

Please—I don't know what we're going to do. We should have went for help—we should have went for help.

APPELLANT: You tried as best you could to stop it.

MRS. MAURO: I—

APPELLANT: Shut up.

MRS. MAURO:—taken him to a mental hospital or something. What'll we do?

APPELLANT: Shut up.

DET. MANSON: Do you know a reverend or a priest or someone you can talk to—take care of David?

MRS. MAURO: No.

APPELLANT: Don't answer questions until you get rights of attorney before you find out what's going on. You tried to stop me as best you can. What are you going to do, kill me? You tried the best you can to stop me.

MRS. MAURO: I don't—we don't—I don't have money.

APPELLANT: There's a public attorney.

MRS. MAURO: I don't know.

APPELLANT: There's a public attorney. Why don't you just be quiet.

MRS. MAURO: I don't have any money to bury him. I don't have any money. All I got is enough money for the rent for the children and that's it.

(Continued on following page)

available, and that she was not at fault for failing to stop him. (J.A. at 242-43.)

Prior to trial, the prosecution stated its intention to use the conversation as rebuttal to an expected claim of insanity. [J.A. at 39-40, 45; R.T. of Dec. 1, 1983 (Evidentiary Hearing) Vol. 3 at 473, 530; R.T. of Dec. 2, 1983 (Evidentiary Hearing) Vol. 4 at 670.]

In the 21-day trial for first-degree murder and child abuse, a picture emerged of Mauro as an intelligent, articulate, sometimes violent individual, who fancied himself an evangelist and used his family as a captive congregation. Anyone posing the least resistance to his views was cast in the role of a "witch" or "devil." [*See e.g.*, R.T. of Jan. 12, 1984 (Trial) Vol. 6 at 892-911; R.T. of Jan. 18, 1984 (Trial) Vol. 9 at 1517-28.] In one psychiatrist's opinion:

> [W]hen I called him a compulsive person with paranoid traits, in other words, he's all too ready to expect opposition and hostility and scheming from other people, and I think that this is the way he perceived Linda and maybe Daniel and David as well.
>
> As far as having a mental illness on the morning of November the 23rd, the comments that I have just made would have to be taken into account with the observations of Daniel and Linda on that morning, and they would tell me that he was at the very time

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(Continued from previous page)

DET. MANSON: Did you want to talk to your husband any more?

MRS. MAURO: No, I can't talk to him.

APPELLANT: Then don't talk to me—get out.

MRS. MAURO: I don't know what to do. O.K.

(J.A. at 242-43.)

> that he went into the bathroom and choked and strangled and killed David, that he was in control and that he knew what he was doing, and that he was reacting to what he perceived as opposition to him and that he could not tolerate this vestige of resistance, even from a child in this weakened state, and that this is what precipitated the anger in him, which ultimately ended in the homicidal act.

[R.T. of Feb. 7, 1984 (Trial) Vol. 18 at 3341.]

As part of his insanity defense, Mauro presented the testimony of Bruce Griffen, an attorney with the firm representing Mauro. Griffen observed Mauro after his initial appearance, the same day as the earlier conversation between Mauro and his wife. Griffen described Mauro as "catatonic," in a trance-like state, and totally uncommunicative; Mauro did not appear to realize Mr. Griffen and Mr. Bayles, another attorney from the firm, were trying to talk to him. Griffen thought that Mauro was "crazy." (J.A. at 150-53.)

The defense also offered a tape-recording of Mauro and Don Bayles, made on the same date, as further evidence of Mauro's mental condition that day. (J.A. at 180-81, 184-85.)

The defense relied on the testimony of Dr. Gerstenberger, a psychiatrist, who described in detail his observations of and conversations with Mauro on the day of the crime. (J.A. at 164-69, 175-76, 178-81, 184.) Dr. Gerstenberger described Mauro as "wild-eyed," extremely agitated, disoriented with disjointed responses. (J.A. at 176-77.) He testified that Mauro's behavior, depicted in Defendant's Exhibit Number 172 (a tape of Mauro made on November 23 by Mr. Bayles), was similar to the way Mauro appeared to him on the same day. (J.A. at 180-81.)

The tape was admitted and played to the jury. (J.A. at 185.) Dr. Gerstenberger concluded that Mauro suffered from psychotic symptoms on the day of the murder. (J.A. at 175, 180-81.)

The behavior observed by Dr. Gerstenberger contrasted sharply with the manner in which Mauro acted during his conversation with his wife earlier in the day, closer in time to the murder. Dr. Gerstenberger admitted at the evidentiary hearing, and in surrebuttal, that during the conversation with his wife, Mauro appeared to be in touch with reality.[5] [J.A. at 142, 144; R.T. of Feb. 9, 1984 (Trial) Vol. 20 at 3560-66.]

In rebuttal the state offered the taped conversation between Mauro and his wife. The trial court ruled the evidence admissible, finding no impermissible police conduct and no *Miranda* violation. The trial court noted that questioning ceased when Mauro elected to say nothing unless counsel was present. The trial court found that police presence at the conversation was not a ruse or subterfuge, and that police did not create the situation as an indirect means of violating *Miranda*. The trial court also noted the importance of the tape in view of defense counsel's use of conversations with Mauro, taped later

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5. A: [BY DR. GERSTENBERGER:]

. . . As I said earlier, at that point he was much better grounded in reality.

Q. Isn't it fair to say that that tape shows that he was very much grounded in reality?

A. At that time, yes.

[R.T. of Feb. 9, 1984 (Trial) Vol. 20 at 3565.]

the same day, to establish Mauro's mental state. (J.A. at 216-20, 226-27.) The state limited use of this evidence to closing and rebuttal, asserting that it was probative of Mauro's mental state near the time of the crime. (J.A. at 228-30.)

On appeal, the Arizona Supreme Court reversed Mauro's convictions for first-degree murder and child abuse. *State v. Mauro,* — Ariz. —, 716 P.2d 393 (1986). (J.A. at 231-52.) That court held that police violated Mauro's Fifth Amendment rights by allowing the conversation between Mauro and his wife to commence after Mauro had invoked his *Miranda* rights, and that this amounted to the "functional equivalent" of interrogation under *Rhode Island v. Innis,* 446 U.S. at 291 (1980). Relying on *Wainwright v. Greenfield,* — U.S. —, 106 S.Ct. 634 (1986), the Arizona Supreme Court also held impermissible the presentation of the tape to the jury as a basis for determining Mauro's sanity.

The Arizona Supreme Court denied the state's motion for rehearing on April 15, 1986, and the state filed for a writ of certiorari on June 13, 1986. This Court granted the petition for writ of certiorari on October 6, 1986.

SUMMARY OF ARGUMENT

Police did not violate Mauro's Fifth or Sixth Amendment rights to counsel by "allowing a conversation to commence" in their presence. The Fifth Amendment protections of *Miranda* apply where official compulsion,

coupled with custody, is likely to overbear the accused's will. Where police conduct bears no such indicia, it does not constitute the functional equivalent of interrogation under *Rhode Island v. Innis.*

The Sixth Amendment right to counsel ensures the assistance of counsel following initiation of adversary criminal proceedings and curbs governmental interference with the accused's right to rely on counsel once the criminal process has begun. Where the Sixth Amendment right to counsel has not attached, and its concerns are not present, the reasoning in Sixth Amendment cases is inapplicable to questions of interrogation under the Fifth Amendment.

The due process considerations in *Wainwright v. Greenfield* that led this Court to prohibit comment on an accused's silence, after *Miranda* warnings, as evidence of sanity, were misapplied to exclude this evidence because Mauro was not silent and did not rely on *Miranda* warnings during the conversation with his wife. Exclusion is particularly inappropriate where the evidence is highly probative and used only in rebuttal for the limited purpose of countering defense evidence of insanity.

ARGUMENT

I. THE FIFTH AND SIXTH AMENDMENTS PROTECT SEPARATE RIGHT-TO-COUNSEL INTERESTS THAT DO NOT WARRANT THE APPLICATION ADOPTED BY THE ARIZONA SUPREME COURT.

The question in this case is whether, under the circumstances, Mauro was subjected to "interrogation" after invoking his Fifth Amendment right to counsel because

police "allowed a conversation to commence" with his wife. A corollary of that is the validity of the Arizona Supreme Court's holding that this Court's analysis of the right to counsel under the Sixth Amendment is "equally applicable" in this Fifth Amendment setting. Finally even if a constitutional violation occurred, was the state nonetheless entitled to use those statements, solely in rebuttal, to counter Mauro's evidence of his mental state on the day he murdered his son? The Arizona Supreme Court has used the Sixth Amendment right-to-counsel analysis to define "interrogation" under *Miranda* in a Fifth Amendment context. In so doing, that court has expanded the definition of "interrogation" under the Fifth Amendment beyond that set forth by this Court in *Rhode Island v. Innis,* to include Sixth Amendment analysis that is unwarranted by this Court's decisions and especially inappropriate under the facts of this case.

A. The Fifth Amendment right to counsel ensures the privilege against compulsory self-incrimination.

The Fifth Amendment, applied to the states through the Fourteenth Amendment, guarantees the privilege against compulsory self-incrimination. In *Miranda v. Arizona,* 384 U.S. 436 (1966), this Court established procedural safeguards to protect the exercise of that privilege from the inherently coercive effects of custodial interrogations. *Miranda* recognized that custodial interrogations are, by their very nature, "compelling pressures" which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely. *Moran v. Burbine,* — U.S. —, 106 S.Ct. 1135

(1986), *citing Miranda v. Arizona,* 384 U.S. at 467. Thus, when a suspect in custody requests the assistance of counsel, all interrogation must cease until an attorney is present. *Miranda v. Arizona.* This is not to say that all statements made after a suspect is in custody must be considered the product of interrogation. The test is as follows:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. at 301 (footnotes omitted). The "fundamental import" of the privilege, therefore, prevents interrogation, or its functional equivalent, not suspect speech. *Rhode Island v. Innis,* 446 U.S. at 300-301, citing *Miranda v. Arizona,* 440 U.S. at 478. *Miranda* itself specifically exempts "volunteered statements of any kind" from the definition of interrogation. *Innis* thus reasons that interrogation under *Miranda* must reflect "a measure of compulsion above and beyond compulsion inherent in custody itself." 446 U.S. at 300.

As an added degree of protection against coercive police practices, the focus under *Innis* is on the perceptions of the suspect rather than the intent of the police. 446 U.S. at 301. *Innis* makes clear that police are not held accountable for the unforseeable results of their words or actions; consequently, the caveat in defining interrogation as "words or actions on the part of police officers that they *should have known* were reasonably likely to

elicit an incriminating response." 446 U.S. at 302. The Fifth Amendment right to counsel extends through the investigative process until the judicial process commences. It provides protection prior to the initiation of criminal proceedings. After initiation of criminal proceedings, the protection afforded by the Sixth Amendment comes into play.

B. The Sixth Amendment ensures the assistance of counsel at all critical stages after the initiation of adversary criminal proceedings.

The Sixth Amendment right to counsel protection, on the other hand, involves considerations different from the Fifth Amendment. This right attaches at the commencement of adversary proceedings. *Massiah v. United States,* 377 U.S. 201 (1964); *McLeod v. Ohio,* 381 U.S. 356 (1965) (Sixth Amendment applicable to states). In *Kirby v. Illinois,* 406 U.S. 682 (1982), this Court acknowledged that in a long line of cases originating with *Powell v. Alabama,* 287 U.S. 45 (1977), it has become firmly established that the Sixth Amendment right to counsel attaches only after adversary proceedings have begun.

In *United States v. Gouveia,* 467 U.S. 180 (1984), this Court affirmed the attachment of Sixth Amendment right-to-counsel protections at the initiation of adversary proceedings, noting the "plain language of the amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary . . . ." The Sixth Amendment right to counsel is limited to confrontations occurring after initiation of adversary proceedings because it is only then that the government has committed itself to prosecute, and only then that the adverse positions of the parties solidify. *Kirby v. Illinois.* The pur-

pose of the Sixth Amendment, as reiterated recently in *Moran v. Burbine,* is to assure that the accused is not left to his own devices in a criminal prosecution. That right is not triggered by pre-indictment custodial interrogations.

This Court has rejected attempts to enlarge the definition of adversary proceedings to include arrests or investigations prior to arrest. *See United States v. Gouveia; Hoffa v. United States,* 385 U.S. 293 (1966). A pretrial Sixth Amendment claim depends upon the initiation of adversarial proceedings, and the pretrial confrontation must concern a critical stage at which the presence of counsel is necessary to preserve the right to a fair trial.

The relevant inquiry under the Sixth Amendment is whether the government has interfered with the right to counsel by deliberately eliciting incriminating statements in the absence of counsel. *Massiah v. United States.* This may occur in cases of direct questioning, or where the government intentionally creates an opportunity to confront the accused without counsel present. *United States v. Henry,* 447 U.S. 264 (1980) (intentional planting of informant in accused's cell for purpose of eliciting incriminating statements violates Sixth Amendment). In *Maine v. Moulton,* — U.S. —, 106 S.Ct 477, 487 (1985), this Court reiterated the guarantees of the Sixth Amendment right to counsel:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner

> that circumvents the protection accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the *Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. See Henry,* 447 U.S. at 276, 100 S.Ct., at 2189 (POWELL, J., concurring). However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

(Emphasis added.)

C. The Sixth Amendment standard of "interrogation" does not apply to Fifth Amendment concerns.

Recently, in *Kuhlmann v. Wilson,* — U.S. —, 106 S.Ct. 2616 (1986), this Court again examined the Sixth Amendment right to counsel and discussed the meaning of the "deliberately elicit" standard of *Massiah.* The purpose of adopting this standard in the context of the Sixth Amendment, rather than simply determining whether the statements were obtained by interrogation, is to protect the accused from "indirect and surreptitious interrogations" as well as jailhouse interrogations, where the government interrogates by means of an agent after iniation of the criminal process. *Kuhlmann v. Wilson,* 106 S.Ct. at 2629. In *United States v. Henry,* the Court found

that the government informant "deliberately" used his position to secure information in the absence of counsel by stimulating conversation in order to elicit information —thus like *Massiah,* engaging in "indirect and surreptitious interrogatio[n]," *Kuhlmann v. Wilson,* 106 S.Ct. at 2629. Similarly, the *Kuhlmann* court noted the emphasis in *Maine v. Moulton,* on the relationship between the defendant and the informant; the informant's engaging the defendant in conversation about their upcoming trial was certain to elicit incriminating statements pertaining to those charges. This was a violation of the Sixth Amendment. 106 S.Ct. at 2629. The same "investigatory techniques," however, that result in incriminating statements in circumstances to which the Sixth Amendment has not attached, are, of course, admissible at trial. *Kuhlmann v. Wilson,* 106 S.Ct. at 2630 n.21, citing *Maine v. Moulton,* 106 S.Ct. at 479. Such a finding assumes that where the concerns of the Sixth Amendment are not present, even conduct that arguably violates that right does not warrant finding a violation under the Fifth Amendment. *See also Michigan v. Jackson,* — U.S. —, 106 S.Ct. 1404, 1409 n.5 (1986) (differentiating between otherwise similar methods of investigation, depending on whether Fifth or Sixth Amendment rights are implicated).

The Sixth Amendment standard of "deliberately eliciting" and "knowing exploitation" requires more than mere "presence":

> As our recent examination of this Sixth Amendment issue in *Moulton* makes clear, the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since the

> "Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached," [citation omitted] a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported the incriminating statements to the police. Rather, the defendant must demonstrate that the *police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.*

Kuhlmann v. Wilson, 106 S.Ct. at 2630 (emphasis added).

Thus, the Arizona Supreme Court misapplied the "knowing exploitation" standard of *Moulton* in this Fifth Amendment context. Moreover, under either standard, there was no impermissible police conduct here. Police neither "interrogated" Mauro, nor by their conduct "deliberately elicited" incriminating remarks.

II. MAURO'S STATEMENTS TO HIS WIFE WERE NOT THE RESULT OF "INTERROGATION" AS DEFINED BY RHODE ISLAND v. INNIS, AND THEREFORE, NOT VIOLATIVE OF HIS FIFTH AMENDMENT RIGHTS.

There is no question that a suspect who invokes his right to counsel is not subject to interrogation by police until counsel is present. When Mauro, after *Miranda* warnings, requested counsel, he exercised his Fifth Amendment right against self-incrimination.

There was no interrogation by police. "Interrogation" under *Miranda* means more than express questioning, but it does not include all statements resulting from police words or actions. The rule is set forth in *Rhode Island v. Innis,* 446 U.S. at 301:

> "[I]nterrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. [Footnotes omitted.]

Police did not question Mauro after he invoked *Miranda*. Indeed, prior to Mauro's conversation with his wife, there were no words exchanged between Detective Manson and Mauro. (*See* J.A. at 242-43.) Linda Mauro began the conversation with her husband. Detective Manson was conspicuously present, clearly within earshot, and openly tape recording the exchange. (*Id.*)

The Arizona Supreme Court found interrogation from what it held to be "clear" police intent—allowing the conversation to commence with the knowledge that if the conversation took place, "incriminating statements were likely to be made."[6] (J.A. at 245.)

The "functional equivalent" definition under *Innis* focuses heavily on the suspect's perceptions, not only the intent of the police. *Rhode Island v. Innis*, 446 U.S. at 301. That the Arizona Supreme Court focused almost exclusively on assumed police intent, rather than Mauro's perception, shows a clear misapplication of Fifth Amendment principles. The Arizona Supreme Court's failure

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6. The testimony set out by the Arizona court in its opinion does not support this finding. (J.A. at 241-42.) Rather than testify that they knew incriminating statements "were likely to be made," as the Arizona Supreme Court suggests, both detectives testified only that they knew it was "possible that [Mauro] might make" or "may have given" an incriminating statement. This is a far cry from knowledge that incriminating statements were likely to be made.

to focus primarily on the suspect's perceptions ignores the fact that the *Miranda* safeguards were designed to vest the suspect with added protection against coercive police practices. *Rhode Island v. Innis,* 446 U.S. at 301.

Had the Arizona court scrutinized Mauro's perception of the situation, it is clear that no "interrogation" would have been found. The officer openly monitored the conversation, and Mauro knew he was there. He knew from two previous *Miranda* warnings that anything he said could and would be used against him. Police said and did nothing to bring about the conversation or direct its content. Indeed, Detective Manson tried to dissuade it. Nothing in the officer's conduct invited any response. In no sense did police interrogate Mauro.

Police intent has a bearing on whether they should have known that their actions were reasonably likely to evoke an incriminating response. This Court in *Innis* noted that where a "police practice is designed to elicit an incriminatory response from the accused, it is unlikely that the practice will not also be one which police should have known was reasonably likely to have that effect." 446 U.S. at 301 n.7. The record here supports no such finding. The Arizona Supreme Court's contrary conclusion that the police intended to interrogate, has no support in the record. For example, the Arizona Supreme Court considered that, prior to the conversation, Mrs. Mauro told Detective Manson about her husband's history of mental illness and his behavior before and after the homicide. (J.A. at 240-41.) It did not point out, however, that Sergeant Allen who made the decision to "allow the conversa-

tion," and whose intent presumably was of paramount importance, was not privy to the conversations between Manson and Linda Mauro. (J.A. at 85-86.) Clearly then, Sergeant Allen's intent did not hinge upon any knowledge of an "unusually disoriented or upset individual," a factor considered in *Innis* to be of significance in determining police intent. Moreover, Detective Manson, the officer who interviewed Linda Mauro at the station, did not authorize the conversation, did not believe it was a good idea, and informed both Mrs. Mauro and his supervisor of this fact. (J.A. at 112.) The evidence does not sustain a conclusion that either Allen or Manson intended to interrogate Mauro indirectly through his wife.[7]

Additionally, the officers testified that Mauro's behavior at the station manifested nothing out of the ordinary. (J.A. at 77-78, 93-95, 98, 103-04, 129-31.)[8] The

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7. An examination of Detective Manson's conduct also supports a finding of lack of intent to interrogate. For instance, police did not try to use the presence of Mrs. Mauro as a confrontation-technique method of interrogation. (J.A. at 81-87.) In fact, when he accompanied her to the police station, Manson avoided any inadvertent meeting of the two parties. (J.A. at 112.) This evidence further supports a finding that police did not engage in a practice "designed to elicit" incriminating responses. *See Rhode Island v. Innis*, 446 U.S. at 301 n.7.

8. Moreover, despite the obviously emotion-charged atmosphere at the K-Mart store when Mauro first reported the killing, there was substantial evidence of Mauro's rational behavior with police. For example, he acknowledged that he killed his son, he told the police where the body could be found and he directed the police to the location of the suitcase when police initially could not find it. Mauro even acknowledged to police that he could be considered dangerous by suggesting that he could show police the location of the body after he was

(Continued on following page)

content of the conversation bears out this observation. Mauro was rational, coherent and certainly appeared in touch with reality. There is nothing in this record suggesting that officers were aware that he was somehow "particularly susceptible" to this "police conduct"; nor could they reasonably be expected to know that allowing his wife to talk to him would likely result in incriminating statements. More importantly, the police in no way brought about the meeting or controlled the content of the conversation. Therefore, here, even more so than in *Innis*, the record does not show that the officer's conduct was "particularly 'evocative.'" 446 U.S. at 303. The police "action" under scrutiny here simply amounts to their justifiable presence at a brief encounter between Mauro and his wife, initiated by Mrs. Mauro, and acquiesced in by police out of sympathy for her plight, not as a surreptitious means of impermissible interrogation. Mauro was free to engage in conversation with his wife or not; he was the sole master of the content of his statements. Mauro plainly knew the police were present and could see that the conversation was being recorded.[9]

(Continued from previous page)

secured in handcuffs. He also expressly told officers at the scene that he would not harm anyone. [R.T. of Nov. 30, 1983 (Evidentiary Hearing) Vol. 2 at 261-65, 278, 295A, 304, 323.] According to the officers, Mauro appeared to be rational, albeit understandably upset. (*Id.* at 278, 295A, 304.) Mauro's over-all behavior supports the officers' conclusion that Mauro was rational.

9. Petitioner maintains that the presence of the tape recorder is irrelevant to determining the question of whether police interrogated Mauro in view of the fact that police presence was obvious. Since no interrogation occurred by police allowing the conversation to commence in their presence, the fact that the meeting was openly recorded, does not alter this finding.

The Arizona Supreme Court also relied on the fact that police asknowledged the *possibility* of incriminating statements to presume the intent to interrogate. That kind of analysis leads to the conclusion that the no-interrogation rule of *Miranda* can be satisfied only if police profess to believe there is no possibility of incriminating statements, or the circumstances establish purely accidental discovery of incriminating statements. This Court rejected that reasoning in *Innis:*

> But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. at 302 (footnote omitted).

Under the Arizona Supreme Court's analysis, if police candidly admit that an incriminating statement is "possible,"—and it almost always is—they have evinced a design to interrogate. Awareness of a possibility is surely not equivalent to a *motive* to circumvent Fifth Amendment rights. The Seventh Circuit's analysis in *United States ex rel. Church v. DeRobertis,* 771 F.2d 1015 (7th Cir. 1985), illustrates this point. In that case, police officers, knowing that the defendant's brother would try to persuade him to confess, placed the two together in a cell, apparently at the brother's request. 771 F.2d at 1017. The defendant had twice invoked his rights and police ceased questioning him. After his brother's urging, he notified police that he wished to talk. Police readvised him of *Miranda* rights, obtained a waiver, and gave him paper

and pencil with which to write out his confession. The Seventh Circuit found this no different than if the confession had been written out at the brother's urging in the absence of police and given to police. It also rejected the defendant's contention that police "interrogated" him by putting his brother in his cell, knowing he would urge the defendant to confess:

> [T]he detectives knew there was a chance that Kelly would persuade Michael to confess. This does not mean, however, that putting Kelly in the cell was "interrogation." The words of an opinion such as *Innis* draw their scope from the concerns the Court addresses. The Court was concerned about official trickery. . . . The Court has consistently held that where the central concerns of *Miranda* are not activated—where in some category of cases there is no plausible argument that the police are using some device to undercut the privilege against self-incrimination—the *Miranda* rules do not apply.
>
> . . .
>
> Unless an element of potential trickery or overbearing by the police is part of the definition of "nonverbal interrogation," *almost anything that produces a confession would be interrogation. Innis* rejects such a test of but-for causation. Suppose the police put a Bible in a suspect's cell, or permit him to attend a religious service at his request. Or suppose they simply leave paper and pencil in his cell. Are these things "interrogation"? But for the paper and pencil the suspect could not write out his written confession, yet there is nothing about the action of leaving writing implements in the cell that comes close to "compulsion" as that word is used in the privilege against self-incrimination.

771 F.2d 1015, 1018-19 (emphasis added; footnote omitted). So too, here, condemning as interrogation "allowing a

conversation to commence" amounts to application of a "but-for cause of a confession" test. Adoption of such a standard by the Arizona Supreme Court applies an interpretation to *Innis* that does not withstand logical scrutiny. As noted in *DeRobertis,* and recognized in *Innis,* not everything leading a suspect to speak amounts to interrogation.

The fact that police may have realized the possibility of a statement from one or both parties is more a product of accurate and reasonable police investigation prior to charging rather than a function of impermissible police practices. Mauro spoke to his wife because he wished to continue directing her activities, and, apparently, to keep her from aiding the investigation.

If a suspect confesses because of some sort of "subtle compulsion," that does not mean he has been "interrogated." The Arizona Supreme Court's reasoning is as flawed as the Rhode Island Supreme Court's in equating "subtle compulsion" with interrogation:

> The Rhode Island Supreme Court erred, in short, in equating "subtle compulsion" with interrogation. That the officers' comments struck a responsive chord is readily apparent. Thus, it may be said, as the Rhode Island Supreme Court did say, that the respondent was subjected to "subtle compulsion." But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions *on the part of police* that they should have known were reasonably likely to elicit an incriminating response. This was not established in the instant case.

Rhode Island v. Innis, 446 U.S. at 303 (emphasis added; footnote omitted).

"Allowing the conversation to commence" is not such a practice. It bears none of the indicia of police practices cited in *Innis:* that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. 446 U.S. at 299. *Innis* cites as examples of impermissible police conduct, practices such as: the use of a coached witness at a lineup to establish defendant's guilt as a predicate to further interrogation; the "reverse line-up" to identify defendant by coached witnesses of a fictitious crime; various psychological ploys such as positing the guilt of the subject, minimizing the moral seriousness of the crime, and casting blame on the victim or society. *Rhode Island v. Innis,* 446 U.S. at 299. "Allowing the conversation to commence" is not comparable to any of these. Mrs. Mauro's presence, not police conduct, resulted in Mauro's statements. That her unsolicited request to speak to her husband and her unrehearsed comments may have persuaded him to speak, does not transform the statements into a product of police action that they should have known was reasonably likely to elicit an incriminating response.[10] By happenstance,

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10. Like the situation in *Rhode Island v. Innis,* 446 U.S. at 303 n.9, the record here does not suggest the officer's conduct was designed to elicit a response. The trial judge who heard the officer's testimony, expressly found that other considerations motivated acquiescing to Mrs. Mauro's insistent requests to see her husband and that police presence was not a "ruse" or "subterfuge" to interrogate. (J.A. at 218.) The unchallenged fact that the request for the meeting originated with Mrs. Mauro further strengthens a finding of lack of any *design* by police to elicit a response. The same holds true considering that police had no prior discussion with Mrs. Mauro about the content of her conversation. Because police were merely present at the meeting, one is hard-pressed to find this conduct demonstrates a deliberate design to elicit a response.

her request gave officers an opportunity that they would otherwise not have had. Police neither originated the idea of the meeting nor orchestrated the content of the conversation. Mauro chose to talk openly in the presence of the police officer. The officer did not impermissibly interrogate Mauro by passively listening. Under the Arizona Supreme Court's expansive reading of *Miranda,* volunteered, spontaneous statements, as well as statements derived from official compulsion, would be excluded. The Arizona Supreme Court erred in so finding and its judgment should be reversed.

III. WAINWRIGHT v. GREENFIELD DOES NOT CONTROL THIS CASE BASED ON ITS FACTS OR UNDERLYING RATIONALE.

After erroneously finding that Mauro's statements to his wife constituted interrogation in violation of the Fifth Amendment under *Rhode Island v. Innis,* the Arizona Supreme Court also ruled that this evidence was impermissibly presented to the jury to assist them in determining Mauro's sanity. The court relied on this Court's opinion in *Wainwright v. Greenfield,* — U.S. —, 106 S.Ct. 634 (1986), as "instructive," and by way of footnote suggested that portions of the conversation "probably" violated Mauro's Fourteenth Amendment due process rights. (J.A. at 247-48.) Petitioner submits that the Arizona Supreme Court misapplied *Greenfield* and substantially departed from the intent of this Court's analysis.

Greenfield holds that the prosecution may not use a defendant's post-arrest post-*Miranda* warnings "silence"[11]

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11. Post-*Miranda* warnings "silence" includes muteness and the statement of a desire to remain silent as well as a desire to remain silent until an attorney has been consulted. 106 S.Ct. at 641 n.14.

as evidence of sanity, and that to do so violates the Due Process Clause of the Fourteenth Amendment. 106 S.Ct. at 633-34. In *Greenfield,* the prosecutor argued in closing that the specific occasions on which the defendant exercised his rights after *Miranda* warnings demonstrated a degree of comprehension inconsistent with his claim of insanity. 106 S.Ct. at 636-37. *Greenfield* held that the analysis of *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), was controlling. In *Doyle* the defendants took the witness stand and offered an explanation for their participation in the crime. On cross-examination, the prosecutor impeached their testimony by asking them why they had not explained their conduct at the time of arrest. This Court held that violated the Due Process Clause.

As noted in *Doyle,* the source of the unfairness in using *Miranda* silence as impeachment stems from the implicit assurances contained in the *Miranda* warnings that "silence will carry no penalty." Although the *Miranda* warnings carry no such express promise, this is implicit in the warnings received:

> Mr. Justice WHITE, concurring in the judgment in *United States v. Hale,* [422 U.S.] at 182-183 [95 S.Ct., at 2139-2140], put it very well:
>
> > "'[W]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.

> . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case.'" *Doyle v. Ohio,* 426 U.S. at 618-619, 96 S.Ct., at 2245 (footnotes omitted).

Wainwright v. Greenfield, 106 S.Ct. at 638 n.5. As applied by *Greenfield,* the *Doyle* premise that it is fundamentally unfair to violate *Miranda's* implicit assurances, remains the same whether the issue is defendant's guilt, as in *Doyle,* or his sanity, as in *Greenfield.* It is this finding, the implied promise reliance, that is the basis of both the *Doyle* holding and the *Greenfield* prohibition. Conversely, where there is no implied promise, reliance or breach, there is no fundamental unfairness and no due process violation. *Greenfield* makes this clear. 106 S.Ct. at 638-40.

This Court has consistently refused to extend *Doyle* to cases where the implicit promise or breach of *Miranda* concerns are not present. *Wainwright v. Greenfield,* 106 S.Ct. at 639-40, citing *South Dakota v. Neville,* 459 U.S. 553 (1983) (no due process violation to comment on failure to take blood-alcohol test because warnings not of constitutional dimension and no implied assurances contained in warnings); *Fletcher v. Weir,* 455 U.S. 603 (1982) (no due process violation in cross-examination of testifying defendant about post-arrest silence in absence of *Miranda* warning); *Jenkins v. Anderson,* 447 U.S. 231, 240 (1980) (no due process violation in use of defendant's pre-arrest silence on cross-examination for impeachment purposes in absence of *Miranda* warnings, i.e.: "no governmental action" inducing the accused to remain silent); *Anderson v. Charles,* 447 U.S. 404 (1980)

(no due process violation when defendant makes post-arrest stantements after receiving *Miranda* warnings and statements used to impeach inconsistent exculpatory testimony at trial).

A. There was no "silence" in Mauro's conversation within the meaning of Miranda.

The Arizona Supreme Court's application of *Greenfield* to this case is unsound because it ignores both the facts that brought the *Greenfield* analysis into play and the rationale upon which it was based. Petitioner submits that *Greenfield* has no application to the instant case because the statements in question clearly did not constitute "silence" as defined by *Greenfield*. *Greenfield* defines silence as a refusal to speak in the face of *Miranda*, or an invocation of the right to silence or an invocation of the right to counsel under *Miranda*. During the conversation with his wife, Mauro admonished her not to speak and to get a lawyer. (J.A. at 242-43.) There was no *Miranda* "silence" in the conversation. He made no reference to his own silence or invocation of rights. *See e.g. United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978). In *Warren*, evidence was introduced that one defendant advised his co-defendant brother and another party not to say anything. The Fifth Circuit noted that the evidence did not imply the defendant had exercised the right to remain silent, rather, he merely admonished others not to speak. Admission of the testimony did not amount to a comment on the exercise of the defendant's right to remain silent.

The distinction between *Miranda* "silence" (muteness or invocation of rights) and statements, while not paramount to this Court's finding in *Greenfield*, is important

to the *Doyle-Greenfield* analysis. 106 S.Ct. at 639. It was the "ambiguity" of silence in the face of accusation that caused the Court to question the claim that such evidence had probative value for purposes of determining guilt or sanity. 106 S.Ct. at 640. Where statements are made, as here, there is no "ambiguity." *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements, because such questioning makes no unfair use of silence.

A defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. In *Anderson v. Charles,* 447 U.S. at 408, this Court rejected the Sixth Circuit's characterization that a due process violation occurred when the prosecutor questioned the defendant about his post-arrest failure to tell officers the same story he told at trial. This Court concluded that where the questions were not designed to draw an inference from silence, but to elicit an explanation for a prior inconsistent statement, *Doyle* does not apply. *Anderson v. Charles,* 447 U.S. at 409; *see also, Hockenbury v. Sowders,* 718 F.2d 155 (6th Cir., 1983). To remain "silent" within the meaning of *Doyle,* and hence *Greenfield,* requires more than lack of a statement—it requires reliance on *Miranda* warnings.

B. The state did not breach the implied assurance of Miranda warnings.

The critical factor in analyzing an alleged due process violation is whether the state breached its implied assurances that silence would not be used against the defendant. *Wainwright v. Greenfield,* 106 S.Ct. at 640. No

Greenfield violation occurred here. Unless there was "silence" in reliance upon *Miranda* warnings, the state could not have violated any implied assurances relating to *Miranda* silence. Mauro made statements to his wife. The conversation did not involve any assertion of, or reliance on, his own *Miranda* rights—rather, he voluntarily advised his wife and responded to her comments and questions. He spoke in front of the officer, who openly recorded the meeting. Mauro knew that his statements were being recorded. He knew from his earlier *Miranda* warnings that anything he said could and would be used against him. Having been so advised, he has no valid claim that the use of his statements was fundamentally unfair as a violation of the implied assurances flowing from invocation of his rights. The conclusion that no violation occurred here is even stronger than the position taken in the separate, concurring opinion by Chief Justice Rehnquist in *Greenfield,* that invocation of the right to counsel does not carry the same implied assurances that attach to the right to remain silent. 106 S.Ct. at 642.

The state's use of Mauro's statements to his wife did not violate *Wainwright v. Greenfield* nor the underlying rationale of that case. Since there was no use by the state of Mauro's post-*Miranda* "silence," nor any violation of *Miranda's* implied assurances, there was no due process violation.

C. The conversation was offered for the limited purpose of countering specific defense evidence of Mauro's mental state.

If one assumes, *arguendo,* that a Fifth Amendment violation occurred, this Court has recognized instances

where the use of *Miranda*-violative statements fulfills a legitimate function in promoting the primary objective of the adversary system of justice—the search for truth. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 722 (1975); *Harris v. New York*, 401 U.S. 222, 225 (1971). The same rationale applies here.

The state introduced Mauro's statements to counter[12] evidence offered by the defense aimed at establishing his unstable mental condition on the day of the murder. Specifically, the defense presented the testimony of one of his defense attorneys, Bruce Griffen, a psychiatrist, Dr. Gerstenberger, who recounted visits with Mauro the day of the murder, and a tape recording of a meeting between Mauro and defense attorney Donald Bayles. This tape was used to bolster Dr. Gerstenberger's opinion that Mauro was insane a few hours earlier, at the time of the killing.

At least one court has found the *Doyle* rationale inapplicable to a prosecutor's comment on post-*Miranda* silence made in direct response to defense arguments.

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12. In special action proceedings brought by the state prior to trial, the Arizona Supreme Court held that the statute concerning the insanity defense that was in effect at the time of the commission of the act would apply at trial, rather than the amended version of Ariz.Rev.Stat.Ann. § 13-502, which took effect after the date of the alleged crime but before trial. Under the former statute, a defendant could rebut the presumption of sanity by introducing evidence which generated substantial and reasonable doubt of his sanity. The state then had the burden of proving sanity beyond a reasonable doubt. Under the amended version of Ariz.Rev.Stat.Ann. § 13-502(B), a defendant must prove by clear and convincing evidence that he was not criminally responsible by reason of insanity. *State v. Coconino County Superior Court, Div. II*, 139 Ariz. 422, 426, 678 P.2d 1386, 1390 (1984).

Nichols v. Wainwright, 783 F.2d 1540, 1543 (11th Cir. 1986). In *Nichols,* the defendant argued that his behavior following his arrest was probative of the veracity of his defense. *Nichols* noted that *Greenfield* was inapplicable to this situation:

> *Greenfield*'s holding that the general defense of insanity does not invite comments upon or evidence of post-*Miranda* silence is inapplicable to the instant case in which the defense was specific in its reliance upon the proximity of the statement to the time of arrest. *Greenfield* neither specifically nor implicitly overruled footnote 11 of *Doyle v. Ohio* which permits comment upon post-*Miranda* silence in response to defense arguments....

783 F.2d at 1543 n.2.

It does not advance the goals of the criminal justice system to keep from the jury probative statements directly pertaining to sanity even if *Miranda*-violative. This is not a situation like *Greenfield,* where the state introduced the *Miranda*-violative evidence in its case-in-chief. It was Mauro's presentation of insanity evidence taken shortly after he conversed with his wife that made the conversation with his wife extremely probative. In this respect, the remedy outlined in *Greenfield* (that the state's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of arrest could be served by carefully framed questions avoiding the mention of the defendant's exercise of his rights), is ill-suited to the facts of this case. The defense did not rely solely upon evidence that Mauro appeared "irrational" at the time of his arrest and after, but offered selected portions of his words and conduct. To restrict the state's rebuttal to "carefully framed questions" that avoid any

"specific reference to this conversation" is to unjustifiably cripple the state's ability to test the credibility of Mauro's witnesses and respond to his defense.

This situation differs little from the case where a defendant chooses to set aside the protections of *Miranda,* gives testimony inconsistent with previous statements, and is thereby subject to impeachment with his previous statements. The Fifth Amendment is not violated when a defendant testifying in his own behalf is impeached with his pre-arrest silence because it follows his decision "to cast aside his cloak of silence" and advances the truth-finding function of the criminal trial. *Jenkins v. Anderson,* 447 U.S. at 238. In a similar sense, Mauro cast aside any reliance on the Fifth Amendment when he affirmatively offered the specific evidence he introduced at trial. As in the case of a defendant who chooses to testify:

> "[T]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown v. United States,* 356 U.S. 148, 156, 2 L.Ed.2d 589, 78 S.Ct. 622, 72 A.L.R.2d 818 (1958)

Jenkins v. Anderson, 447 U.S. at 238. Unwarranted exclusion of this probative evidence unduly hampers the jury's ability to judge the validity of the offered defense. The prevention of erroneous acquittals founded on false insanity pleas is a legitimate and important societal goal. *See Sulie v. Duckworth,* 689 F.2d 128, 131 (7th Cir. 1982), *cert. denied,* 460 U.S. 1643 (1983).[13] This Court should

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13. Petitioner recognizes that the *Sulie* court reached a conclusion contrary to that subsequently expressed by this Court in *Greenfield,* but submits that the above reasoning remains valid.

reverse the finding of the Arizona Supreme Court that *Wainwright v. Greenfield* precluded admission of the conversation between Mauro and his wife, under the circumstances it was offered, to rebut specific evidence of conduct and conversations pertaining to his mental condition at the time of his arrest. A new trial on these grounds is unjustified.

———o———

CONCLUSION

The Arizona Supreme Court erred in finding a violation of the Fifth Amendment right to counsel. The Fifth Amendment protections of *Miranda* apply in situations where official compulsion, coupled with custody, are likely to overbear the accused's will and amount to a "compulsion" to testify against oneself. Where police conduct in "allowing a conversation to commence" between the suspect and his wife bears no such indicia, it does not constitute the functional equivalent of interrogation under *Rhode Island v. Innis*. Because the Sixth Amendment right to counsel had not attached and its concerns were not present, the Arizona Supreme Court erred in applying the reasoning of Sixth Amendment cases to the question of interrogation under the Fifth Amendment. Moreover, the due process considerations in *Wainwright v. Greenfield* that led this Court to preclude comment on an accused's invocation of the *Miranda* rights, or resultant silence as evidence of sanity, has been inappropriately applied by the Arizona Supreme Court to this case, which involves neither "silence" nor reliance on *Miranda* warnings. Finally, the Arizona Supreme Court erred in precluding ad-

mission of these highly relevant statements where they were used to rebut specific defense evidence on the issue of sanity.

The Court should reverse.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

JOHN VERKAMP
Coconino County Attorney

JACK ROBERTS
GEORGIA B. ELLEXSON*
Assistant Attorneys General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 255-4686

Attorneys for PETITIONER

*Counsel of Record

(5)

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No. 85-2121

In The
Supreme Court of the United States
October Term, 1985

STATE OF ARIZONA,

Petitioner,

vs.

WILLIAM CARL MAURO,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF FOR RESPONDENT

KATHLEEN KELLY WALSH*
Attorney at Law
BREWSTER & WALSH
9 W. Cherry, Suite B
P.O. Box 22176
Flagstaff, Arizona 86002
(602) 774-5165

Attorney for RESPONDENT

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964

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QUESTION PRESENTED

Was the Arizona Supreme Court correct in holding that a Fifth Amendment violation occurred when, in answer to a request from respondent's wife, after respondent stated he would not make a statement without a lawyer present but before he was charged or afforded a lawyer, the police allowed a conversation to commence, and then in rebuttal at trial, the state introduced a recording of this conversation, which they knew or should have known was reasonably likely to elicit incriminating statements, to counter respondent's claim of insanity?

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OPINION BELOW

Respondent accepts the Petitioner's statement of the opinion below, *State v. Mauro,* 149 Ariz. 24, 716 P.2d 393 (1986).

———o———

STATEMENT OF JURISDICTION

Respondent accepts the Petitioner's statement of jurisdiction.

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts the Petitioner's constitutional provisions involved.

———o———

STATEMENT OF THE CASE

David Anthony Mauro, age seven, died of suffocation on November 23, 1982, presumably at the hands of his father, William Carl Mauro. The defense in this case was that Mauro was not legally culpable for the acts he committed on that morning because he suffered from a mental disease or illness which rendered him incapable of appreciating the nature and quality of his actions, or if he could, then he could not appreciate the wrongfulness of those actions. Under Arizona law applicable at the time, there was a presumption of sanity, rebuttable by the defendant through evidence which created a reasonable doubt as to his sanity. The burden of proof shifted to the state to prove sanity beyond a reasonable doubt.

As with any insanity defense, a key evidentiary element is the observation of others. Mauro's actions not

only on the morning of November 23rd, but immediately before, as well as immediately after, are relevant and probative of his mental state at the time David died. His past mental history is also highly probative of Mauro's mental state on that morning.

Bill Mauro entered into a psychotic state approximately four days prior to David's death. His wife testified that he spent the time pacing the floor, restless and sleepless days on end, reading the Bible and praying constantly, in an effort to ward off the space creatures which were outside the family trailer, waiting to capture his family's souls. Other hallucinations included the spirit of Linda Mauro's sister, a professed witch, who had come specifically to take Linda Mauro's soul. David Mauro's imprisonment in the bathroom began shortly after Bill Mauro's psychotic episode manifested itself in such bizarre behavior. (J.A. at 234).

David died on the morning of November 23, 1982, at approximately 8:00 A.M. His father rushed from the bathroom to retrieve a suitcase from the bedroom and return to the bathroom. Moments later, he emerged with the suitcase, instructed his family to pray and left, wearing only a light cotton shirt and pants. It was a cold November morning, and Mauro had no shoes, no socks, no jacket. Clutching the suitcase, Bill Mauro headed for an empty field, where he buried the suitcase beneath a cross of logs. Mauro then appeared at the nearby K-Mart store at approximately 9:30 A.M. Several employees testified as to Mauro's behavior during the short period of time he was in the store, and all of them portrayed a man who was "crazed" or "delirious", claiming to have killed the beast

or the devil. Mauro was insistent that they telephone the police, stating that he had killed the devil and later explaining that the devil was his son. (J.A. at 232-233).

When the police arrived, Mauro continued to rant about having killed the devil, his son. Mauro wanted very much for the police to discover the suitcase because, whatever was in it was still alive. Mauro insisted that they handcuff him, stating that he would not hurt anyone, obviously still waging his private war with the devil. Mauro directed the police to the field where he had buried the suitcase and became quite agitated when the police could not immediately find the suitcase. He stated "I'll take the rap," and "I had to do it, it wasn't my son, it was the devil." He then pointed out the specific pile of logs where the suitcase was buried and the police uncovered it, retrieving David's body. [J.A. at 233, R.T. of Jan. 5, 1984 (Trial) Vol. 2 at 284.]

Mauro was advised of his *Miranda* rights twice following the discovery of the body, first on the way to the station by Sergeant Byron Allen, (J.A. at 68-69), and then, at the Flagstaff police department by Captain Gary Latham and Detective Bill Trimble. (J.A. at 77). At that time, Mauro said he did not want to talk with police officers until he had an attorney. The police officers, at least in the immediate, ceased all questioning of him. (J.A. at 81-82, 93, 98-99, 102-103). Mauro remained, however, in Captain Latham's office, awaiting transport to the Coconino County jail.

After police had been dispatched to K-Mart, Linda Mauro called to report the disappearance of her husband and her son. By that time, the body had already been discovered and two officers went to her house to inform her

of David's death and to accompany her to the station. Detective Frank Manson questioned her initially, at which time she informed him of her husband's extensive mental health problems over the past twelve years. She then asked to speak with her husband, which Detective Manson tried to discourage. She insisted and, in an effort to "pass the buck" he told her if his supervisor agreed, he would allow it. (J.A. at 110-114).

Detective Manson then approached Sergeant Allen with Linda Mauro's request. Manson reiterated that he did not think it was a good idea but Allen disagreed, telling Manson they should be able to speak together and he, Manson, was to be present, along with a tape recorder. Allen cited four reasons for Manson's presence: (1) Concern for Linda Mauro's safety; (2) Ignorance about the extent of Linda Mauro's involvement in the homicide; (3) The possibility of husband and wife concocting a story or "getting their story straight"; (4) The potential for an escape attempt. Reasons one and four could have been alleviated by waiting until Mauro was transported two blocks to the county jail, and having Linda and Bill speak through the appropriate visitation facilities provided there. (J.A. at 75-76).

There was no reason given for the presence of a tape recorder in this session, other than Detective Manson, who explained that he taped the conversation in order to preserve it. Linda Mauro was informed that she could see her husband, but only under the conditions that Detective Manson be present and the conversation would be tape recorded. (J.A. at 116). Significantly, Bill Mauro was never asked if he wanted to see his wife, nor was he in-

formed that a police officer would be present, nor that the conversation would be recorded. The conversation between Bill and Linda Mauro, albeit brief, was pregnant with incriminating statements.

As noted earlier, Mauro's behavior on November 23, 1982 was significant to both prosecution and the defense in establishing or refuting the insanity defense. A neighbor was called in to testify as to Mauro's behavior upon leaving the trailer. K-Mart employees were called in to testify about his behavior at the store. Police officers testified as to his behavior during the discovery of the body and at the police station. Sheriff's deputies were called in to testify as to Mauro's behavior at the jail. Dr. Dean Gerstenberger, a local psychiatrist, who had the rare opportunity to visit with his patient on the day of the homicide, testified extensively as to his behavior that day in the jail. Bruce Griffen, an attorney with the law firm appointed to represent Mauro testified as to his behavior in the jail. A deputy county attorney and a justice court clerk were called in to testify as to Bill Mauro's behavior at the initial appearance that afternoon.

Dr. Gerstenberger testified extensively as to Mauro's psychotic state, particularly on November 23. Specifically, Dr. Gerstenberger explained how, even during a psychotic episode, an individual can appear to be more grounded in reality. He explained that he uses a scale of 0 to 3 to determine the degree of cognition, with 0 being totally grounded in reality and 3 being totally out of touch with reality. Based upon his observations, as well as the statements of those seeing Bill Mauro, the tape recording at the police station as well as the tape recording made with

attorney Don Bayles, it was Dr. Gerstenberger's opinion that Bill Mauro fluctuated between a 1 and a 2½ during that day, the 2½ representing his actions in the trailer, as described by Linda Mauro and the low rating of 1 describing his behavior at the police department. However, as Dr. Gerstenberger pointed out, the appearance of being in touch with reality does not in any way indicate that Mauro's thought processes were intact and cited several examples of psychotic patients who, at one moment could speak rationally and, the next moment, take off on a totally irrational conversation. (J.A. at 182-184).

Dr. Gerstenberger originally diagnosed Bill Mauro as a paranoid schizophrenic; however, with greater information concerning not only Bill's past history, but his mother's diagnosis as a manic depressive, the diagnosis was changed to manic depression, now known as bi-polar affective disorder. Bill Mauro has a documented history of at least ten hospitalizations between 1970 and 1982, including a hospitalization during a psychotic episode in February, 1982, wherein Dr. Gerstenberger was called as the treating physician. Dr. Gerstenberger had an opportunity to see Bill Mauro on at least a dozen occasions subsequent to the homicide.

The State relied on the diagnosis of Dr. Michael Cleary of Phoenix, who had the opportunity to observe Bill Mauro on two occasions, the first of being approximately four months after the homicide. Dr. Cleary initially diagnosed Bill Mauro as a compulsive person with paranoid traits and, based upon observations by Daniel and Linda Mauro on the morning of November 23rd, Dr. Cleary arrived at the conclusion that Bill Mauro was not

insane. However, on rebuttal, Dr. Cleary admitted that there was some doubt in his mind as to Bill Mauro's mental state on that morning, particularly in light of some facts that Linda Mauro conveniently forgot to tell Dr. Cleary, which may well have changed his mind. [R.T. of Feb. 8, 1984 (Trial) Vol. 19 at 3473-3475].

—o—

SUMMARY OF ARGUMENT

The Arizona Supreme Court correctly held that the conversation between Bill Mauro and his wife, in the presence of a police officer and tape recorder, was the functional equivalent of custodial interrogation, defined and prohibited under *Rhode Island v. Innis*. Mauro's Fifth Amendment protection against self-incrimination was violated when, after Mauro had invoked his *Miranda* right to counsel, the police set up a situation where they should have known that it was reasonably likely that incriminating statements would be made. Further, it is a violation of Mauro's Fifth Amendment right to counsel for the police to have initiated this contact, tantamount to an interrogation, once Mauro had requested an attorney.

The Sixth Amendment right to counsel had not yet attached, inasmuch as the adversarial process had not begun. The Arizona Supreme Court did not apply a Sixth Amendment standard in determining that police conduct was the functional equivalent of custodial interrogation. Merely citing language from a Sixth Amendment case is not tantamount to applying a Sixth Amendment standard in determining whether police conduct amounted to interrogation.

The due process considerations enumerated by the Court in *Wainwright v. Greenfield* were not applied by

the Arizona Supreme Court to prohibit the use of the tape or the conversation. The rationale behind *Wainwright v. Greenfield, however,* was used to demonstrate that the State's legitimate interest in proving Mauro's behavior to be sane would be preserved by allowing carefully framed questions concerning his behavior which avoid any mention of the constitutional violation against him, which is the conversation between Mauro and his wife.

ARGUMENT

I. THE ARIZONA SUPREME COURT DID NOT INCORRECTLY APPLY SIXTH AMENDMENT STANDARDS TO A FIFTH AMENDMENT DETERMINATION OF VIOLATION OF RIGHT TO COUNSEL.

The State of Arizona, in its brief, pp. 10-15, explains quite eloquently the law surrounding Fifth and Sixth Amendment rights to counsel. The right to counsel under each amendment stems from very different constitutional concerns. The Fifth Amendment right to counsel stems from the desire to protect suspects from self-incrimination. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). In *Moran v. Burbine,* — U.S. —, 106 S.Ct. 1135 (1986), this Court reiterated the *Miranda* Court's concern that custodial interrogations puts "compelling pressure" upon suspects which, by their very nature, work to undermine the suspect's will, and often compels him to speak where he otherwise might not. It is further explained that the *Miranda* obligations were imposed upon police officers in order to "to combat this inherent compulsion and thereby protect the Fifth Amendment privilege against self-incrimination." 106 S.Ct. at 1140.

A more detailed discussion of the functional equivalent of interrogation standards found in *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the standard by which Fifth Amendment right to counsel violations are determined, will follow in the ensuing section. With that, the attention is focused on the State's discussion of the Sixth Amendment right to counsel. The Arizona Supreme Court and Mr. Mauro readily agree with the State of Arizona that the Sixth Amendment protects defendants once the adversarial process has begun, and that, clearly, Mr. Mauro's Sixth Amendment right to counsel had not attached at the time of the unconstitutional conversation.

An in-depth review of the Arizona Supreme Court's opinion (J.A. at 240-246) reveals that the case was clearly decided on Fifth Amendment principles and that the *Rhode Island v. Innis* standard of determining the functional equivalent of custodial interrogation was applied. Arizona's high court determined that the police officers knew that it was reasonably likely that Mauro would make incriminating statements. With that in mind, a tape recorder captured the conversation. (J.A. at 245).

In determining that the officers knew it was reasonably likely that Mauro would make incriminating statements, the Arizona court focused on the intent of the police officers. Since the intent of the police officers was so clear, it was not necessary to determine the perceptions of Mr. Mauro, although he may well have been unusually disoriented or susceptible to the influences of police officers.

However, in dictum, the Arizona Supreme Court quoted *Maine v. Moulton*, — U.S. —, 106 S.Ct. 477 (1985), which is, in fact, a Sixth Amendment case. The Arizona Supreme

Court found it necessary to explain the rights of suspects who had invoked the right to silence. "In doing, so we believe the language in a recent United States Supreme Court opinion on the right to counsel under the sixth Amendment is equally applicable here:

> '[The right to counsel] is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached [Citation omitted]. However, *knowing exploitation* by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such opportunity.'

Maine v. Moulton, — U.S. —, 106 S.Ct. 447, 487 (1985) (emphasis added)." (J.A. at 246).

The State has seized upon the mere use of Sixth Amendment language to argue that the Sixth Amendment standard of "deliberately eliciting" found in *Massiah v. United States,* 337 U.S. 201 (1964) or "knowing exploitation" found in *Maine v. Moulton* was improperly used in this Fifth Amendment case. The State would put the Fifth and Sixth Amendments in separate vacuums, emphasizing their differences and ignoring their similarities. However, while the standards themselves remain separate for determining whether the right to counsel has been violated under the Fifth or Sixth Amendment, the language is often interchanged.

The Sixth Amendment case, *Kuhlmann v. Wilson,* 106 S.Ct. 2616 (1986) states "The defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberate-

ly to elicit incriminating remarks." 106 S.Ct. at 2630. This is strikingly familiar to the language found in *Rhode Island v. Innis,* footnote 7, which states in particular "Where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." 446 U.S. at 301, 100 S.Ct. at 1190.

In the line of cases stemming from *Massiah,* this Court has held that when the Sixth Amendment right to counsel has attached, the police may not "deliberately elicit" incriminating responses, either directly or indirectly. See, e.g., *Maine v. Moulton.* This Court has also held that the police may not interfere with a defendant's right to counsel under the Sixth Amendment by "knowingly exploiting" an opportunity any more than they can intentionally create that opportunity under the "deliberately elicit" prohibition. *Maine v. Moulton.*

While "deliberately elicit" and "knowing exploitation" are not standards for determining interrogation under the Fifth Amendment, this Court did use the language of the "deliberately elicit" standard in *Rhode Island v. Innis* as a measuring stick to determine police intent. This is no different than the Arizona Supreme Court's use of the "knowing exploitation" language to gauge the intent of the police officers.

Another example of the juxtaposition of Fifth and Sixth Amendment language is found in *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). In that case, Justice Powell, in his concurring opinion, stated that "to demonstrate an infringement of the Sixth

Amendment, a defendant must show that the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation." (Citations omitted). 447 U.S. at 277, 100 S.Ct. at 2190. Fifth Amendment language, i.e. the functional equivalent of custodial interrogation, is used to describe a Sixth Amendment situation.

A further review of the Arizona Supreme Court opinion would explain why the "knowing exploitation" passage is appropriate. Arizona state law allows for police officers to testify as to conversations overheard when there is no evidence of any intent to surreptitiously eavesdrop. *State v. Narten*, 99 Ariz. 116, 407 P.2d (1965) *cert. denied* 1984 U.S. 1008, 86 S.Ct. 1985 (1966). The Arizona Supreme Court was distinguishing between incidents where portions of the conversation are overheard by police officers and there is no intent to surreptitiously eavesdrop, as compared to this situation, where the police officers seized upon the opportunity presented by Mrs. Mauro to overhear any incriminating statements Bill Mauro might make. The trial court erroneously applied *Narten* as controlling. (J.A. at 216).

If the police officers, in the instant case, had asked Linda Mauro to speak with her husband, and then recorded the conversation, their conduct would have been condemned as deliberately eliciting incriminating statements, thus showing the intent of the police officers to create a situation they knew was reasonably likely to elicit incriminating statements. However, Mrs. Mauro requested the conversation herself. Nevertheless, the police knowingly exploited the request in order to create a situation where incriminating statements might be made. Knowing

they could no longer interrogate Mauro directly, they seized upon an indirect method to get him to talk. They had total control over the situation, once Linda's request was made. It was their decision to put Mr. and Mrs. Mauro together. It was their decision to place a police officer, armed with a tape recorder in the room. It was their decision to withhold the information from Bill Mauro that his wife wanted to speak with him. It was their decision to withhold from Bill Mauro the conditions under which the conversation took place.

No, the police did not create the situation by requesting Linda to speak with Bill. However, once that request was made, the police exploited the opportunity, taking total control of the situation, knowing it was reasonably likely that incriminating statements would be made. Their conduct is as egregious as if they had prompted the conversation themselves.

There was no Sixth Amendment violation, since the adversarial proceedings had not yet commenced. However, neither did the Arizona Supreme Court apply an improper standard by condemning the knowing exploitation of the golden opportunity to do indirectly what they could not do directly.

II. THE ARIZONA SUPREME COURT PROPERLY FOUND THE CONVERSATION BETWEEN MAURO AND HIS WIFE AMOUNTED TO THE FUNCTIONAL EQUIVALENT OF CUSTODIAL INTERROGATION AS DEFINED BY RHODE ISLAND v. INNIS.

A proper reading of the Arizona Supreme Court opinion dictates the finding that the conversation itself

was impermissible, since allowing the conversation to commence was the functional equivalent of custodial interrogation, as defined and prohibited under *Rhode Island v. Innis*. The Arizona Supreme Court applied the principles announced in the *Innis* case when it noted that interrogation includes a "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." *Rhode Island v. Innis*, 446 U.S. at 301, 100 S.Ct. at 1690 (1980). "The focus on ascertaining whether particular police conduct amounts to interrogation then is not on the form of the words used but the intent of the police officers and the perceptions of the suspect." (citation ommited) (J.A. at 245).

The State questions the propriety of the determination by the Arizona Supreme Court that the police officers should have known their actions were reasonably likely to evoke an incriminating response. The facts of the case, quite simply, support the finding by the Arizona Supreme Court that the officers knew it was reasonably likely that incriminating statements would be elicted.

Detective Allen testified:

Q. . . . Certainly when you sent an officer in there to listen to that conversation you knew that it was possible that he might make incriminating statements?

A. That's correct.

Q. And obviously you want to record that conversation so as to have in it a record of those incriminating statements.

A. That's correct. (J.A. at 241).

Detective Manson testified:

Q. Frank, certainly you were aware that during the conversation either Linda or my client may have given an incriminating statement?

A. Yes.

Q. And obviously one of the purposes of your tape recording the interview was to take down any such statements?

A. Yes, sir. (J.A. at 242).

The State argues that the testimony alludes to the knowledge of a "mere possibility" that incriminating statements might be made. Certainly the Arizona Supreme Court did not make its finding based upon that testimony alone. The totality of the circumstances must be considered. There were four reasons why the police officer was present in the room with Bill and Linda Mauro. (1) They were concerned for Linda Mauro's safety. (2) They were "somewhat in the dark" as to Linda Mauro's involvement in the homicide. (3) They were afraid that Bill and Linda Mauro might concoct a story or otherwise get their stories straight, for the benefit of the police. (4) They were worried about an escape attempt. Clearly, reasons number two and three show a direct knowledge that it was reasonably likely that Bill or Linda or both may make incriminating statements. Obviously, they were hoping Bill or Linda would discuss the homicide, perhaps shedding light on Linda's involvement, as well as clarifying Bill's role in his son's death. (J.A. at 101). Secondly, by expressing their concern that Bill and Linda may try to concoct stories, it shows a knowledge that it was reasonably likely that incriminating statements would be made.

This Court stresses in *Rhode Island v. Innis* that the police "cannot be held accountable for the unforeseeable results of their words or actions." 100 S.Ct. at 1690. However, the concerns show that the police were unaware of the extent of Linda's involvement, and the possibility of collusion between Bill and Linda prompted not only the presence of a police officer, but a tape recorder, as well. It was not only foreseeable but desirable, as well, that incriminating statements would be preserved.

The argument that it was necessary for a police officer to be present for the safety of Linda Mauro and to prevent an escape attempt is undoubtably legitimate. However, it is inconceivable that two primary suspects in a homicide would be allowed to converse together for "humanitarian reasons". If the police officers were so purely compassionate toward Linda, yet faced with the problems of safety and a possible escape attempt, the situation was easily remedied. As Capt. Latham testified, both problems would be eliminated by allowing Bill and Linda to converse in private at the county jail, in facilities designed to prevent both problems. (J.A. at 106-107).

The Arizona Supreme Court relies primarily upon the intent of the police officers. Indeed, there was no necessity to discuss the perceptions of the defendant, since the intent of the police officers was so very clear. This Court, in *Rhode Island v. Innis,* noted that, in determining whether the police should know that their words or actions are reasonably likely to elicit an incriminating response, the focus is upon the perceptions of the suspect rather than the intent of the police. *Rhode Island v. Innis,* 100 S.Ct. at 1690. However, this Court further explained. "This focus reflects the fact that the *Miranda* safeguards were

designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to the objective proof of the underlying intent of the police." *Id.*

To place upon the criminal defendant the burden of proving the subjective intent of the police officers would so cripple him that it would render the safeguards of *Miranda* nonexistent. Only in extremely rare cases will subjective intent of the police officers be so clear. This was recognized by this Court in footnote 7 of *Rhode Island v. Innis,* which states "This is not to say the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." 100 S.Ct. at 1690. This is precisely the case at bar.

The State clearly misapplies the standard for determining whether the police knew or should have known that their actions were reasonably likely to elicit incriminating information. The State argues that the lack of knowledge by Sgt. Allen of Mauro's bizarre behavior and mental illness history is relevant in determining police intent. However, under *Innis,* the unusual disorientation of a defendant is relevant only in determining his perceptions. Further, the State may not claim a lack of knowledge of Mauro's mental health problems when Det. Manson, who was one of two officers involved in setting up the conversation, had extensive knowledge of the problems. Lastly, both Sgt. Allen and Det. Manson observed this bare footed, scantily clothed individual claiming to have killed the devil earlier that November morning.

Should this Court hold that it was improper for the Arizona Supreme Court to rely solely on the intent of the

police officers in determining that they knew it was reasonably likely that incriminating statements would be made, a proper remedy would be for the Arizona Supreme Court to analyze the perceptions of the defendant from the entire record on appeal.

The State attempts to analogize this case with *U.S. ex. rel. Church v. De Robertis,* 771 F.2d 1015 (7th Circuit 1985). In that case, one brother was put in a cell with another brother, who had requested counsel and otherwise invoked his *Miranda* rights. After the two brothers had been in the cell for awhile, the defendant decided to make a statement. He initiated the contact with the police officers, signed a waiver in writing, and proceeded to make a confession. This is obviously a completely different situation than the case at bar. Bill and Linda Mauro had a police officer present with them at all times, while defendant Church did not. Secondly, the police contact was initiated by the defendant himself, a situation not present with Mr. Mauro.

The importance of the defendant initiating contact was expressed in *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). This Court held that

> "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges, or conversations with the police."

451 U.S. 484-485, 101 S.Ct. 1884-1885.

It is absolutely clear that no contact was initiated by defendant Mauro in this case.

This was recognized in a footnote found in *Moran v. Burbine*, 106 S.Ct. 1135 (1986). Footnote one states specifically that the holding in *Edwards* dictates that "when a suspect has requested counsel, the interrogation must cease, regardless of any question of waiver, unless the suspect himself initiates the conversation. In other words, there cannot be a valid waiver of the right to counsel, once it has been invoked, unless and only, if the defendant himself initiates the conversation." 106 S.Ct. at 1142. This Court has frequently emphasized that a favorable characteristic of Edwards is the "bright-line" application of the rule. *Michigan v. Jackson*, — U.S. —, 106 S.Ct. 1404, 1410 (1986). *Smith v. Illinois*, 469 U.S. —, 105 S.Ct. 490, 494, 83 L.Ed.2d 488 (1984). *Solem v. Stumes*, 465 U.S., at 646, 104 S.Ct. at 1343. Clearly, if a custodial interrogation is found, the "bright-line" application of *Edwards* dictates that there was no valid waiver of Mauro's right to counsel. Mauro did not initiate the contact with the police; rather it was the police, through Linda Mauro's insistence, who initiated the contact with Bill Mauro. The police had total control over the situation and kept Linda Mauro apprised, while keeping Bill Mauro in the dark. No valid waiver of the Fifth Amendment right to counsel can be found merely because Bill Mauro chose to speak in front of police officers.

III. THE ARIZONA SUPREME COURT DID NOT IMPROPERLY APPLY THE PRINCIPLES OF WAINWRIGHT v. GREENFIELD TO EXCLUDE THE TAPED CONVERSATIONS.

Again, a clear reading of the Arizona Supreme Court opinion shows that the taped conversation was improperly

admitted because of the violation of principles found in *Rhode Island v. Innis*. In fact, it specifically was not decided upon principles found in *Wainwright v. Greenfield*. In a footnote to the opinion, the Arizona Supreme Court held specifically that portions of the taped conversation may or may not be excluded, based upon due process considerations it was not necessary to do piecemeal analysis of each statement, however in as much as the whole conversation was excluded under Fifth Amendment principles. (J.A. at 247-248). Again, *Wainwright v. Greenfield* was not controlling in this case; however, it was merely used in an effort to be instructive.

This analysis was well founded, based upon the opinion of this Court in *Wainwright v. Greenfield*, which held that post *Miranda* silence, as well as the invocation of that right and the right to counsel under *Miranda* may not be used as evidence for sanity. This decision was based upon the principles enunciated in *Doyle v. Ohio*, 426 U.S. 610 (1976), and its progeny, which states that cross examination of a defendant by asking him why he did not explain his conduct at the time of his arrest was fundamentally unfair and a violation of the due process clause of the Fourteenth Amendment. The common thread of the cases is that it is the implied assurance that the invocation of the right would not be used against a criminal defendant, as well as the ambiguity of what remaining silent means, which leads to the fundamental unfairness.

However, one of the primary concerns of *Doyle* and its progeny, which does not exist in *Wainwright v. Greenfield*,

nor the instant case, deals with the concern that a criminal defendant may perjure himself or herself, and that there would be no way to impeach him by prior inconsistent statements. In fact, many of the cases cited by the State that, when used for impeachment purposes, post *Miranda* silence may be admitted. However, the cases cited by the State deal with the cross examination of a criminal defendant who has elected to testify, and these statements are elicited for the purposes of impeachment, based upon testimony of the defendant. See e.g., *Fletcher v. Weir,* 455 U.S. 603 (1982); *Jenkins v. Anderson,* 447 U.S. 231 (1980); *Anderson v. Charles,* 447 U.S. 404 (1980).

This Court in *Doyle,* was concerned over the risk that exclusion of the evidence would merely provide a shield behind which the defendant may perjure himself. This concern was expressly pointed out in *Wainwright v. Greenfield* as being inapplicable both in that case and the case at bar, and is found in footnote 8: "The constitutional violation might thus be especially egregious because, unlike Doyle, there was no risk that exclusion of the evidence (would) merely provide a shield for perjury." 426 U.S. at 626, 96 S.Ct. at 248 (Stevens, J. dissenting)." In neither *Greenfield* nor the case at bar did the defendant take the stand, nor was the need for impeachment present.

The state complains that it should be allowed to introduce evidence of a taped conversation between Mauro and his wife, regardless of whether or not it is a violation of *Miranda,* simply to combat testimony from the Defendant that was presented in favor of the insanity defense. Specifically, Attorney Bruce Griffen testified as to his observations of Mauro's behavior. Notably, Mr. Griffen did not

testify as to any conversation between himself and Mauro, or between the other attorney, Don Bayles and Mauro. He testified merely as to observations of Mauro's behavior in the jail cell shortly after being transported there. The State argues that, because a privileged conversation (although no conversation was reported by Mr. Griffen) was admitted, that Mauro has waived all constitutional rights. Further, the State argues that the admission of a tape between Don Bayles and Bill Mauro, arguably a privileged conversation, negates Mauro's right to assert any privilege under *Miranda*. However, the incidents are based on completely separate legal premises. The conversation between Don Bayles and Bill Mauro is a privileged conversation under the attorney-client privilege. It is Bill Mauro's right to waive this privilege, if he so desires, as he obviously did by introducing the tape into evidence at trial. However, a waiver of this privileged communication does not mean that he waives all privileged communication, nor does it mean that he waives his *Miranda* rights nor his right to exclude *Miranda* violative statements.

The Arizona Supreme Court insures that rebuttable testimony is allowed. In other words, the important facts concern Bill Mauro's behavior on the day of the homicide. Every one who observed him was allowed to speak of those observations. The Arizona Supreme Court makes that clear, in its opinion, when it specifically sets forth guidelines, stating that police officers may, through carefully framed questions, describe Bill Mauro's behavior and that he was able to talk rationally at the police station. The police officers were not precluded from testifying as to the behavior; merely, as to this specific conversation which was held to be in violation of *Miranda*.

Indeed, the Arizona Supreme Court merely used the rationale behind *Wainwright v. Greenfield,* which also allows for testimony of a defendant's behavior as being probative of his mental state, through carefully framed questions which do not bring up his constitutional rights. It would be fundamentally unfair to allow this state to do indirectly what it cannot do directly, i.e. admit a *Miranda* violative conversation, full of incriminating statements, as evidence of the insanity defense.

CONCLUSION

The Arizona Supreme Court correctly determined that allowing a conversation between Bill Mauro and his wife constituted the functional equivalent of custodial interrogation. This conclusion is founded squarely upon the principles enunciated in *Rhode Island v. Innis.* The Arizona Supreme Court correctly determined that the police officers knew or had reason to know that it was reasonably likely that incriminating statements would be elicited if the conversation were allowed. The Arizona Supreme Court, while acknowledging that this case was not controlled by Sixth Amendment standards, correctly held that knowingly exploiting an opportunity to elicit statements from the suspect is every bit as egregious as deliberately directing an opportunity to do the same. Once the right to counsel under the Fifth Amendment has been asserted, the police officers may take no more action to elicit incriminating responses, without first being approached by the suspect. Lastly, the Arizona Supreme Court did not decide this case under the principles announced in *Wainwright v. Greenfield*, and the due process clause of the Fourteenth Amendment. *Wain-*

wright v. Greenfield merely illustrated that evidence of behavior may be introduced at trial to prove sanity, even though evidence of silence may not.

The opinion of the Arizona Supreme Court should be affirmed.

Respectfully submitted,

KATHLEEN KELLY WALSH*
Attorney at Law
BREWSTER & WALSH
9 W. Cherry, Suite B
P.O. Box 22176
Flagstaff, Arizona 86002
(602) 774-5165

Attorney for RESPONDENT

*Counsel of Record